No. 308

AUG 26 1954

HAROLD B. WILLEY,

IN THE

Supreme Court of the United States

October Term, 1954.

WALTER SCHNEIDER, *Petitioner*

v.

MINN. IRRIG. FARM, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1954.

No.

WALTER BITTERLING, *Petitioner*

v.

MAPLE ISLAND FARM, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Warren E. Burger and B. W. Hart, for and on behalf of Walter Bitterling, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in this case on January 11, 1954 (C. A. 28).[1]

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[1] In referring to material in the printed record, we will refer to Maple Island's two-volume printed record as "R," Bitterling's supplemental record as "S.R.," and the separate volume of exhibits printed by Maple Island as "E," and the volume of proceedings in the Court of Appeals as "C.A."

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Minnesota (R. 979-998) has not been reported. The opinion of the United States Court of Appeals (Appendix, pp. 50-74) is reported at 209 F. 2d 867.

JURISDICTION

The judgment of the Court of Appeals was entered on January 11, 1954 (C. A. 29). A petition for rehearing *en banc,* seasonally filed on March 22, 1954 (C. A. 31-47), was considered and denied on March 30, 1954, by the three judges who heard the case originally (C. A. 49). By order of Mr. Justice Clark dated May 29, 1954, the time for filing a petition for a writ of certiorari was extended to August 27, 1954. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

(1) May a court of appeals, purporting to proceed under the "clearly erroneous" rule, re-try a complex case *de novo* upon a condensed narrative record, and substitute its judgment both on the facts and on the credibility of witnesses for that of an experienced trial judge who saw and heard the two opposing key witnesses testify for 20 of the 27 trial days, and who filed an exhaustive opinion, and thus set aside the trial court's detailed findings, which covered credibility?

If the preceding question is answered in the affirmative by the Court, then the decision of the court of appeals presents the following question:

(2) May the court of appeals reverse a judgment in petitioner's favor and remand with directions to dismiss the complaint when it leaves undisturbed the trial court's documented holding and finding that there is

due petitioner the sum of $49,922.34 in commissions earned by him before, but not payable until after, the termination of his employment?[2]

Should Certiorari be Granted Petitioner Intends to Urge the Following Points

(a) May the court of appeals, in equity and good conscience, permit respondent to retain the entire benefit of petitioner's expenditure of $74,626.00 for a valuable trade name where respondent not only demanded that petitioner secure and transfer the trade name to it as a condition of his employment, but also advanced petitioner $50,000.00 of the amount disbursed for that purpose, and where that employment was terminated by respondent as soon as petitioner had substantially repaid the $50,000.00 and completed the transfer of the trade name to it?[3]

(b) Where petitioner expended $74,626.00 [in June and July 1948] for the purchase and transfer to respondent of the trade name either as a "condition of employment" or of "*continued* employment," may respondent terminate that employment as soon as the transfer of the trade name was consummated without tendering back all or part of petitioner's expenditure?[4]

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[2] The total judgment entered in the trial court on two causes of action was $168,056.39 (Appendix, p. 49).

[3] Transfer of the trade name was completed by October and by then respondent had held back over $50,000.00 in commissions to recover its advance. Petitioner was dismissed without notice October 30, 1948. See *Restatement of Agency*, § 454.

[4] The court of appeals' opinion, Appendix, p. 65, concedes that petitioner spent the $74,626.00 to get the trade name, and states: "Plaintiff's self interest in *maintaining his employment* with Defendant was the motivating force behind his surrender and payment of $74,626.00 to the other stockholders of Distribuidora for the transfer of the trade name." Within a few weeks after the transfer was consummated, respondent terminated petitioner's employment.

(c) Did the court below in a diversity case, err in failing to apply controlling Minnesota law, which provides that where consideration in addition to services is given as a condition of employment, the contract is not terminable at will by the party receiving the consideration?[5]

(d) May the court of appeals properly hold that petitioner's employment was terminated in good faith where the discharge occurred as soon as respondent was certain that the transfer of the trade name to it was completed, where it had recovered its $50,000.00 advance to petitioner, and where the commissions earned ($49,922.34) by petitioner *before,* but payable *after,* his discharge, were all diverted to a "dummy"[6] company and surreptitiously distributed equally among respondent's general manager, two executives of the buying agency who could not legally accept commissions from the seller, and a fourth man whose participation was never explained by respondent?

(e) Conceding the absence of an enforceable long term contract for Venezuela, and even conceding good faith on the part of respondent, was petitioner, in all the circumstances, entitled to receive:

(1) commissions on Venezuelan milk sold by him before termination of the contract but delivered and paid for after termination?

(2) restitution of the $74,626.00 disbursed by petitioner to secure and transfer the trade name to respondent at its express request, and as a condition of his employment?

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[5] *McMullan* v. *Dickinson Co.*, 63 Minn. 405, 408-9. *Cf. Skagerberg* v. *Blandin Paper Co.*, 197 Minn. 291.

[6] For more on St. Croix Trading Company, see *infra,* pp. 11, 12, 22-33.

STATEMENT

For a period of six weeks between June 5, 1950, and September 5, 1950, the Federal District Court for the District of Minnesota, sitting in Saint Paul, heard witnesses and received voluminous documentary evidence in this case.[7] Petitioner's suit in the District of Minnesota was based on diversity arising out of his Oklahoma citizenship. The court wrote a 20-page memorandum opinion, drew 27 pages of findings of fact and conclusions of law, and awarded a judgment against respondent Maple Island in favor of petitioner Bitterling for $168,056.39 (Appendix pp. 2-49)

On January 11, 1954, the Court of Appeals for the Eighth Circuit tried this case *de novo* on an abridged narrative record[8] and, with only a few significant exceptions,[9] reversed virtually all the material findings of the trial court, including its findings on credibility of witnesses,[10] and then, made its own appellate "findings" directly opposed to or inconsistent with those of the trial court.

THE CASE

During World War II, Maple Island Farm, Inc. (respondent), aided by large Army and Navy purchases, grew from a small local dairy into one of the largest processors of powdered milk in the country. With curtailment of government purchases imminent in 1945-46, respondent

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[7] There are over 300 multiple-page exhibits comprising well over 2,000 pages of documentary evidence.

[8] The record in the court of appeals is not a printed copy of the testimony. It is an abridged, narrative statement, drafted by respondent, of the 2,894-page transcript.

[9] One of the most significant exceptions to the wholesale reversal of the trial court findings by the court of appeals was its failure to reverse the trial court finding that petitioner sold the milk that respondent delivered in Venezuela in 1949 (Fdgs. 15, 19, Appendix, pp. 40, 43, 44, 45. See also trial court opinion Appendix, p. 15).

[10] For a more complete discussion of the extent to which the court of appeals usurped the trial court function of judging credibility of witnesses, see *infra*, pp. 12-14, 20-33.

became interested in developing foreign market outlets and in September of 1945 enlisted the aid of petitioner, Walter Bitterling, to help the company develop market outlets in the Latin American countries (R. 434, 677; Fdg. 9, Appendix, p. 24).

Petitioner spoke Spanish fluently, had 15 years of business experience in Latin American countries, principally in sales and export work, and was widely and in many cases intimately acquainted with business and governmental personnel in Venezuela, especially the executives of some of the large oil companies operating in Venezuela.[11] Respondent had no experience in export nor any employees with such experience or with knowledge of Spanish (R. 18-21, 69, 436; Fdgs. 4, 5, 16, Appendix, pp. 22, 23, 40).

Petitioner conceived the trade name "Valle Verde" as a euphonic Spanish language name under which to market Maple Island's milk in Latin America[12] and between September 1945 and February 1946, at respondent's request, he advised and assisted in setting up respondent's entire export program, including packaging, labeling, export licensing, foreign exchange, shipping arrangements, securing sanitary permits, and all other details of entering the export market.[13] During this period, petitioner spent

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[11] Between 1934 and 1938 petitioner spent three and one-half years working with Creole Petroleum Corporation, the largest oil producer in Venezuela, a subsidiary of the Standard Oil Company (N.J.). He was acquainted with executives of the major oil companies in Venezuela. These oil companies run field commissaries, and are the largest purchasers of powdered milk in Venezuela. Creole alone used about three million pounds annually in 1948 and 1949. R. 19-69, Ex. 98, S.R. p. 34.

[12] Since respondent's milk was unknown in the export field and had to compete with about 20 known brands, including such established brands as Borden's "Klim" with 20 years on the Venezuelan market, petitioner advised that an attractive name and an advertising program would be essential. R. 396, 682-3.

[13] In respondent's own testimony: "He [petitioner] apparently had experience in the export line of business. We had none. I [Hadrath] knew nothing of the business at all." (R. 433.) Typical is Exhibit 20, where respondent writes: "Will you, after study of the matter, call me long distance and give me your opinion?" Also in Exhibit 26, Hadrath wrote petitioner about a letter

approximately $2,000.00 of his own money on travel and other expenses, including a trip to Mexico in 1945 with Hadrath, General Manager of respondent (R. 25-6, 601, 685; Fdgs. 9, 10, 11, 12, 13, 14, Appendix, pp. 24-27).

The trial court found that respondent promised to pay one cent a pound commission to petitioner on all sales made to the Mexican distributor that petitioner located, selected, and set in operation, and, independently of such an express contract, petitioner was entitled to a commission of one cent a pound on a *quantum meruit* basis on the 2,682,091 pounds of powdered milk that respondent sold between August 1946 and March 30, 1949, to the distributor set up in Mexico. There was no term or duration expressly fixed for this contract. The trial court found that the $26,820.00 commission thus computed was the reasonable value of the services petitioner performed in helping respondent commence its export program and in establishing its export business in Mexico. This one cent rate of commission was frequently used by respondent between 1945 and 1948 (Fdg. 15, Appendix, p. 29; Ex. 125, S. R. p. 36). Petitioner's active organizing work relating to Mexico spanned September 1945 to February 1946.[14]

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from Mexico asking for quotations and concluded: "Will you kindly look after this matter?" Similar are Exhibits 4, 6, 9, 12, 13, 15, 16, 17, 18, 19, 23, 25, 27, 30, 31, 32, 33, 34 (not printed) and Exhibit 3-R. See Ex. 20, S.R. p. 32.

[14] Hadrath to petitioner: ". . . in view of all of the problems involved in setting up this business from the standpoint of price of the product and other problems it seems to me that the best thing to do would be for you and me to fly down to Mexico City, contact the Grant representative there and discuss with the people in Mexico the different phases of the handling of milk powder in that country. This would give us a complete picture, I believe, of all we could charge, what the different problems are which we will be faced with in the other countries in Central and South America and allow us to talk intelligently to the different people we must necessarily contact if we are to do this job in the proper manner." (Ex. 8, E. p. 5)

Hadrath to Centro: "I am waiting for Mr. Bitterling to arrive from Chicago and when he does, we will send you a letter confirming the arrangements we made with you for the Republic of Mexico." (Ex. 146, E. p. 40)

When petitioner returned from Mexico after helping select a distributor and organize the distribution there, respondent asked him to set up an export distribution program for its powdered milk in Venezuela. Petitioner had Casulleras, one of his business associates in Venezuela, start work on the Venezuelan export program early in 1946, and in March 1946, petitioner went to Venezuela to complete Casulleras' preliminary work. He arranged for shipping, secured office and warehouse space, set up an advertising program, made engagements with wholesalers and retailers, hired personnel, bought trucks and other equipment, and secured distributors for the key areas of Venezuela (Fdg. 2, Appendix, p. 29; R. 51-58, 402-3).

Respondent joined with petitioner and Casulleras in the formation of a new Venezuelan corporation, Distribuidora Valle Verde (herein called Distribuidora) to operate the Venezuelan export program (R. 46-48). The stock was distributed 49 per cent to respondent, 25 per cent to Casulleras, and 26 per cent to petitioner. To compensate petitioner and Casulleras for their services in organizing and setting up the Venezuelan enterprise, respondent paid in the $6,000.00 for the stock issued to them (51%). Although a sharp drop in United States Government purchasing of powdered milk caused a flooding of the export market in late 1946 and early in 1947, and although Valle Verde was a new brand in Venezuela, and although during that period Distribuidora owed respondent as much as half a million dollars on powdered milk shipments, Distribundora managed to sell about a million and a half pounds of respondent's powdered milk to the major oil companies between September 1946 and April 1948 (Fdgs. 2, 3, Appendix, pp. 1, 30; R. 517). Thus, Distribuidora had secured substantial milk orders from the major oil companies for their commissaries and had also developed firm foundations for a wholesale and retail distribution program

throughout Venezuela (R. 517-518).[15] The trade name Valle Verde, originally registered by Casulleras in his own name for later transfer to Distribuidora, of which facts he advised respondent by letter, was assigned to Distribuidora in 1947 (Ex. 47, E. p. 8, R. 403, Fdg. 4, Appendix pp. 31-32, 11).[16]

In 1947 respondent allegedly became interested in getting out of direct distribution, and in October of 1947 insisted on selling its 49 per cent interest to petitioner and Casulleras at a very substantial profit.[17] Respondent also asked for transfer to it of the Venezuelan registration to the trade name "Valle Verde" but although petitioner was willing, Casulleras refused to transfer it, asserting that without an exclusive contract, it was their "only protection." Petitioner and Casulleras paid for respondent's 49 per cent of Distribuidora's stock from their own funds, kept enough to increase their respective interests to 30 per cent each and sold the remaining 40 per cent interest to two of the employees of Distribuidora (Fdg. 3, Appendix, p. 13; R. 74-76, 86, 407, 475, 195, 645).

In March of 1948, Hadrath recalled petitioner from a trade promotion tour he was making on behalf of respondent and told him respondent was going to make a new distribution arrangement in Venezuela with a new organization, Venezuela Basic Economy Corporation,[18] called

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[15] Respondent's General Manager, Hadrath, admitted on cross-examination that ". . . the foundations of the oil company business for Maple Island in Venezuela were the result of Mr. Bitterling's [petitioner's] work." R. 518.

[16] In the face of this conclusive *and undisputed* evidence that Casulleras' June 1946 promise [Ex. 47] was to transfer the trade name "to our company" [Distribuidora], the court below infers it was to be transferred to respondent. (C.A. opin. Appendix, p. 62)

[17] Respondent paid $6,000.00 for its shares (49%) in Distribuidora in 1946 and sold them for $23,800.00 in 1947 (Ex. 88, E. p. 9; R. 407).

[18] V-BEC was a non-profit organization set up by the major oil companies and the Venezuelan Government in 1947 or early 1948 to act as a buying agent primarily for oil company commissary supplies.

"V-BEC," and that petitioner would be needed in Venezuela as respondent's personal representative with V-BEC and the oil companies primarily to promote sales to the large oil companies (Fdg. 6, Appendix, p. 33; R. 92-95).

Subject to the understanding that an amicable arrangement would have to be made to satisfy his Venezuelan associates in Distribuidora, petitioner worked out with Hadrath the new Venezuelan contract, which is the principal subject of this case. In the course of discussions extending over a period from April 1948 through May 1948, it was agreed that respondent would advance $50,000.00 to petitioner through a transfer of credits, petitioner would secure sole control of the trade name "Valle Verde" from his associates in Distribuidora, transfer it to respondent, and liquidate Distribuidora. Respondent in turn promised that to compensate petitioner for his anticipated large expenditure in securing the trade name, then estimated as high as $100,000.00, it would pay commissions to him on a certain sliding scale rate so long as respondent sold milk in Venezuela. This agreement is admitted except that respondent claims it was terminable at will and that the $50,000.00 advance and the agreement to secure and transfer the trade name were "conditions antecedent" and not part of or consideration for the new contract for Venezuela (Fdg. 7, Appendix, p. 34; R. 95-97, 108-109, 280).

In the performance of his contract petitioner induced the major oil companies to requisition large amounts of "Valle Verde" milk (through V-BEC), completed the liquidation of Distribuidora, secured and transferred the trade name to respondent, and earned commissions of about $55,000.00, which were withheld to cover the $50,000.00 respondent loaned to him to help purchase the trade name and some other advances (Fdgs. 7, 8, 9, 10, 15, 18, Appendix 34-37, 40-41). From April and October 30, 1948, respondent sometimes praised, but never criticized, petitioner's

work (R. 114-115, 368).[19] On October 30, 1948, Hadrath flew to Venezuela, checked with respondent's attorney, asking whether the transfer of the trade name to respondent was complete, and then, without advance notice or discussion, told petitioner that his contract was terminated (R. 128, 735, 763, 773; S. R., p. 43, Ex. 175). Respondent thereafter did not hire anyone to carry on the work petitioner had been doing (R. 497, 512). Hadrath, and Toro and Stone the two V-BEC representatives who had recommended petitioner's discharge, formed a company called "St. Croix Trading Company" and diverted all commissions on Venezuelan orders already in process to this company. St. Croix Trading Company performed no services whatsoever and neither Anthony Toro, Stone, nor Hadrath ever did any work to earn the $49,000.00 they took out of St. Croix in eight months. Toro and Stone used two other men's names to "front" for them as partners in St. Croix Trading Company and Hadrath, when questioned under oath, testified that the "front" men were the partners at a time when he had audit statements showing payment of about $26,000.00 to Toro and Stone, who were the real partners. Hadrath also testified that Toro did not receive any money from St. Croix Trading Company, when he had knowledge that Toro received about $13,000.00 (Fdg. 19, Appendix, p. 42; R. 498-503, 871-875; see also S. R. p. 17).

The trial court found that petitioner's contract was terminated without cause and that in addition to the $55,000.00 commissions credited to him up to the time his contract was terminated, he was entitled to recover the commissions on deliveries in Venezuela for a period of about

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[19] Respondent's letter, Ex. 177, S.R. p. 44, congratulates petitioner "on the progress you seem to be making with the commissary men as well as the possibility of your progress with Shell." See also R. 518 and Fdg. 16, Appendix 41.

eight months after his termination, as having been earned by work done *before* the termination, although the commissions were not payable until after (Fdgs. 15-18, Appendix, pp. 40-41). These were the commissions paid to St. Croix Trading Company (R. 511-512).[20] The trial court also found that upon the termination of his contract, petitioner was entitled to recover $74,626.00, representing the expenditure made by him to secure the trade name that he was induced to purchase for, and transfer to, respondent as one of the conditions of the Venezuelan contract (Fdgs. 7-8, Appendix, pp. 34-36). After the judgment was entered against respondent in the trial court, it appealed from the judgment on the ground that diversity of citizenship had not been proved. On motion of respondent and over petitioner's objection, the Court of Appeals permitted respondent to take a special "piecemeal" appeal on the issue of jurisdiction separate from, and in advance of, any appeal on the merits. The trial court's findings on the jurisdictional issue were affirmed and this Court denied certiorari (*Maple Island Farm, Inc.* v. *Bitterling,* 196 F. 2d 55, cert. den., 344 U. S. 832.)

Following denial of certiorari by this Court on the jurisdictional issue, the court below heard the appeal on the merits and reversed and remanded with instructions to dismiss the complaint with costs allowed to respondent.

REASONS FOR GRANTING THE WRIT

The court below, in a sweeping exercise of fact-finding functions which do not belong to it, has rejected the trial court's findings as being "clearly erroneous" on the ground that they are "against the clear weight of the evidence," despite the fact that determination of the weight of the evidence depended entirely on which of two opposing

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[20] Finding 19, Appendix p. 44, states: "All the commissions paid by [respondent] to St. Croix Trading Company on Venezuela sales were rightfully due [petitioner] as commissions for work completed prior to October 30, 1948."

key witnesses was to be believed.[21] In other words, if petitioner is believed, as he was by the trial court, the clear weight of the evidence is in his favor. If, on the contrary, Hadrath, respondent's general manager, is believed, as he must have been by the court below but not by the trial judge, then, *arguendo,* the weight of the evidence can be said to be in respondent's favor. Without even discussing this crucial issue of credibility, the court below implicitly has rejected petitioner's credibility and relied on Hadrath's, ignoring specific findings that Hadrath testified falsely, with full knowledge of that falsity, on material issues where there were conclusive and objective tests of the truth (Fdg. 19, Appendix, pp. 42-44).

Starting from the premise that they were merely reappraising the *weight* of the evidence, the court below then proceeded to reverse most of the essential findings of the trial court *and to disregard the findings on the credibility of the two opposing key witnesses,* and, on that basis, has set aside the decision and remanded with directions to dismiss petitioner's complaint. Moreover, in a strange anxiety to wholly vindicate respondent, it has gone so far as to direct dismissal of petitioner's complaint, notwithstanding that explicit findings *which it has not reversed* fully support the trial court's judgment for petitioner of $49,922.34 under one cause of action representing the unexplained payments diverted to St. Croix Trading Company.[22]

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[21] Trial court opinion states: "Elaborate arguments pertaining to the veracity of the plaintiff and Hadrath have been made in briefs of counsel . . ." Appendix p. 17.

[22] As the trial court said this deprived petitioner of any return whatever for years of admittedly valuable service to respondent, and for a trade name transferred to respondent at a cost fixed by both courts below at $74,626.00. ". . . on October 30, 1948, the plaintiff had acquired three years' experience [in selling respondent's powdered milk], a used automobile, but absolutely no money for his services. The plaintiff was a better salesman than a collector." (Appendix, p. 14). Hadrath on cross-examination admitted that "the result of the whole transaction from the 2nd or 3rd of April 1948 to the 30th of October 1948 *was that he* [petitioner] *still owed us money.*" (R. 764) (Italics supplied)

The decision here sought to be reviewed is extraordinary in that this is not one where the court below has openly denied or challenged the limited scope of appellate review, but rather one where the proper rules, honored to a degree by it with lip service, have not been fully stated, much less correctly applied. Of necessity, in a factual case this Court will seldom go behind what a lower court *says* it has done and, by review determine *what it has really done.* Except in a case like the present one, where the court below's departure from the accepted and usual course of judicial procedure is so demonstrably flagrant, this Court normally could not be expected to exercise its power of supervision. However, if this Court does not grant certiorari in a case such as this, the last clause of Rule 19(1)(b) will lose all vitality.

This petition squarely raises the question whether the court below may escape review and supervision simply by citing broad rules governing the general scope of review, while disregarding the trial court's appraisal of weight of the evidence which here depended upon credibility. The "clearly erroneous" rule is not a convenient facade behind which a federal appellate court may, in a given case, by whim, caprice, prejudice, or mistake, re-try, in a matter of a relatively few hours and on a condensed narrative record, complex issues including credibility, to which a trial court devoted months, involving full, direct, and close contact with the two opposing key witnesses, the parties, and their counsel.[23] To say that well-established and tim ted limitations on the scope of review by appella courts were designed to avoid and prevent such action is merely to repeat a legal truism.

For clarity, some but not all of the actions of the court below reversing findings based on credibility, are here set forth, along with the specific finding reversed:

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[23] Extensive pre-trial examination preceded the trial. Depositions were taken in New York, New Orleans, Wisconsin, and Venezuela. No issue of credibility was involved of any witness not seen by the court.

(i) Trial Court Finding 13 (Appendix, pp. 27-28):

> "There was an oral agreement between the parties for the defendant to pay Plaintiff a commission of one cent a pound on milk sold in Mexico through a distributor."

The court below reversed this finding, stating (Appendix p. 58):

> "That an experienced business man such as Hadrath should contract in this manner . . . is simply incredible."[24]

(ii) Trial Court Findings 15 and 2 (Appendix, pp. 29, 30):

> "Plaintiff performed services for Defendant . . . in connection with the commencement of Defendant's export business and the commencement of its export business in Mexico for which he has not been compensated in any form . . ." (Fdg. 15.)
>
> "The said $5,000.00 advance was not given to Plaintiff as, and was not intended by the parties as, compensation to the Plaintiff for services." (Fdg. 2.)

The court below reversed these two findings, stating (Appendix, p. 73):

> "It seemed to the trial court that Plaintiff had been harshly treated and not fairly compensated by the Defendant. But it appears Defendant gave him a check for $5,000.00."

(iii) Trial Court Finding 7 (Appendix, pp. 34-5):

> "Defendant agreed to pay to plaintiff a commission based on exports into Venezuela each year so long as defendant continued to export into Venezuela on the following scale: . . ." [Scale admitted in pleadings.]

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[24] Yet Ex. 125 shows that Hadrath put a comparable one-cent per pound agreement in writing on another occasion with del Mercado, its export director, and Ex. 157 is a contract calling for 1½ ents per pound for less service than petitioner performed.

The court below reversed this finding, stating:

> "Examination of the record had led to the firm conviction that in truth and in fact Hadrath did not employ the Plaintiff for 'so long as defendant continued to Export to Venezuela.'" (Appendix, p. 70).

(iv) Trial Court Findings 7, 8, 23 (Appendix, pp. 34, 36, 46):

> " . . . Plaintiff and Defendant made and entered into an agreement . . . by which Plaintiff was engaged as Defendant's special representative provided Plaintiff would secure control of and transfer to Defendant in Venezuela the registered tradename Valle Verde . . . The Defendant agreed to advance Plaintiff up to the sum of $50,000.00 to assist Plaintiff to finance the steps to secure control of the registered tradename Valle Verde then owned by said Distribuidora; . . . "
>
> "The Plaintiff performed and carried out the agreement by securing the consent of all the stockholders of Distribuidora Valle Verde to an assignment of the tradename Valle Verde in consideration of Plaintiff's guaranteeing them a minimum of 250,000 Bs. [Bolivares] (about $74,626.00) in the liquidation of that corporation."
>
> " . . . Plaintiff is entitled to reimbursement and restitution for the sum and value of the consideration advanced and paid by him to secure transfer of the tradename to Defendant in the sum of $74,626.00 . . . "

The court below reversed these findings in these words (Appendix, p. 64):

> "Plaintiff's surrender to the demands [for $74,626.00] of the other stockholders of Distribuidora . . . was not induced by any words, acts or conduct, express or implied, on the part of defendant."

This *de novo* evaluation by the court below of the weight of the evidence, which in turn depended entirely on the credibility of the two key witnesses, raises grave questions concerning the permissible area of appellate review and the historic separation of fact-finding functions in the Federal court system as embodied in Rule 52(a).

I.

The Court Below Failed to Apply the Proper Test to the Trial Court's Findings

(a) *The Law.* The court below undertook to state certain general rules governing the scope of appellate review but was silent with respect to the controlling rules where the credibility of two opposing key witnesses is involved. It may be helpful, therefore, to summarize the rules as to both, in order to demonstrate what that court actually did.

The court below stated that "findings of fact are 'clearly erroneous' within the meaning of Rule 52(a) of the Federal Rules of Civil Procedure, if they are against the clear weight of the evidence." With that we agree as it applies to a case where the appellate court is in as good a position as the trial court to decide what is the clear weight of the evidence, *e.g.,* where only written contracts and other documents are involved. *Letcher County* v. *DeFoe,* 151 F. 2d 987, 990 (C. A. 6). But that rule was not intended to authorize appellate excursions into the field of credibility of "witnesses not seen."

United States v. *Gypsum Company,* 333 U. S. 364, rehearing denied, 333 U. S. 869, was cited by the court below for its construction of Rule 52(a) to the effect that the findings of a trial court may be set aside when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (The court below professed to have that "firm conviction" in this case.) Certainly this Court never intended the rule to mean that where there are two permissible views as to the weight of the evidence, a reviewing court may try a case *de novo* on the record, weigh the evidence, and reverse the trial court findings merely because it is "left with a definite and firm conviction" that the trial court *has chosen incorrectly between two permissible views.* That the *Gypsum* case is not to be so construed

was made clear by this Court in *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341, where it stated:

> "There is no exception which permits [a party] . . . to come to this court for what virtually amounts to a trial *de novo* on the record. * * *. While of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of the evidence is not 'clearly erroneous.'*" [Italics supplied.]

In relying on *Gypsum* as they interpret it, the court below has wholly ignored the limitations on the broad general language of that case as defined in *Yellow Cab*. The limitations announced in *Yellow Cab* are in fact the historic restraints self-imposed by appellate tribunals.

Even less susceptible of appellate reversal is the finding of a trial judge on the credibility of witnesses. As the Court of Appeals for the Third Circuit stated in *Smith* v. *McLane*, 174 F. 2d 819, 821, "it is hornbook law" that an appellate tribunal in a civil suit will not redetermine the credibility of witnesses where the trial judge has had the opportunity to observe the demeanor of the key witnesses on the stand.[25] And the entire subject has been aptly reviewed by the Court of Appeals for the Second Circuit

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[25] "We should risk misunderstanding and error if we should attempt to pick out that which makes against it and disregard that which makes for it and judge of witnesses from their reported words as against their living presence, the advantage which the trial court had." *United States* v. *United Shoe Mach. Co.*, 247 U. S. 32, 41. See also to the same effect, *Walling* v. *General Industries Co.*, 336 U. S. 545, 550; *Gates* v. *Wood*, 169 F. 2d 440, 443 (C. A. 40); *Assman* v. *Fleming*, 159 F. 2d 332, 337 (C. A. 8); *Counce* v. *Yount Lee Oil Co.*, 87 F. 2d 572, 575 (C. A. 5); *Wynne* v. *Boone*, 191 F. 2d 220, 222 (C. A. D. C.).

in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 433, when it said:

> "• • • it is idle to try to define the meaning of the phrase, 'clearly erroneous'; all that can be profitably said is that an appellate court, though it will hesitate less to reverse the finding of a judge than that of an administrative tribunal or of a jury, will nevertheless reverse it most reluctantly and only when well persuaded. This is true to a considerable degree even when the judge has not seen the witnesses. His duty is to sift the evidence, to put it into logical sequence and to make the proper inferences from it; and in the case of a record of over 40,000 pages like that before us, it is physically impossible for an appellate court to function at all without ascribing some prima facie validity to his conclusions. Consumers Import Co. v. Kawasaki, 2 Cir., 133 F. 2d 780, 787. What the plaintiff is really asking is that we shall in effect reconsider the whole evidence de novo, as though it had come before us in the first instance. • • •. However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, *when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.'* David v. Schwartz, 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; Adamson v. Gilliland, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; Alabama Power Co. v. Ickes, 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. The reason for this is obvious and has been repeated over and over again; in such cases the appeal must be decided upon an incomplete record, *for the printed word is only a part, and often by no means the most important part,* of the sense impressions which we use to make up our minds. Morris Plan Industrial Bank v. Henderson, 2 Cir., 131 F. 2d 975, 977. • • •" [Italics supplied.]

In *United States* v. *Oregon State Medical Soc.*, 343 U. S. 326, this Court stated:

> "As was aptly stated by the New York Court of Appeals • • •: 'Face to face with living witnesses, the

> original trier of the facts holds a position of advantage from which appellate judges are excluded. In doubtful cases, the exercise of his power of observation often proves the most accurate method of ascertaining the truth. * * *. How can we say the judge is wrong? We never saw the witnesses * * *. To the sophistication and sagacity of the trial judge the law confides the duty of appraisal.' "

One of the most astonishing things about the opinion of the court below is that, while reversing the trial court's findings on credibility, it has avoided any reference to credibility. But the decisive factor in this controversy is the question of credibility of the two opposing key witnesses. Yet the court below has not acknowledged that findings of a trial judge who has seen the witnesses have any particular weight, much less that they are "unassailable," as characterized by this court in *Adamson* v. *Gilliland*, 242 U. S. 350, 353.[26]

(b) *The Findings and Evidence.* The court below took issue with the trial court basically on two major issues. First, whether an agreement was made contemplating compensation for petitioner's services in Mexico, and, second, whether petitioner's contract for the promotion of the sale of respondent's powdered milk in Venezuela was terminable at will by respondent or was for as long as respondent sold milk in Venezuela because of the large investment petitioner had to make. Neither agreement is in writing, although it is clear from voluminous correspondence and records, if indeed it is not admitted, that relationships for Mexico and Venezuela existed and that extensive and valuable services were performed involving large outlays of money by petitioner. All negotiations on both Mexican and Venezuelan services were between petitioner and Hadrath, respondent's general manager. The testi-

[26] ". . . so far as the finding of . . . the judge who saw the witnesses 'depends upon conflicting testimony, or upon the credibility of witnesses, . . . it must be treated as unassailable.' " *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

mony of these two key witnesses, which consumed four full weeks of a trial lasting over five weeks, was directly contradictory on these two basic questions, as well as on subsidiary issues. Evidence was offered by each side to support its key witness and to impeach the credibility of the opposing key witness. The trial court chose to believe petitioner and to disbelieve Hadrath and documented its disbelief of Hadrath in its opinion and in specific findings (Fdg. 19, Appendix, pp. 42-44).

In its opinion the trial court said:

> "Elaborate arguments pertaining to the veracity of the plaintiff and Hadrath have been made in briefs of counsel. Counsel for defendant say, 'It (Plaintiff's testimony) is characterized throughout by untruths, contradictions, and incredibilities.' The plaintiff answered a large number of interrogatories before trial, his deposition was taken at length and he was on the witness stand in the trial for at least two weeks. Mistakes, errors and variances as to detail may be expected in the protracted search and may be found in plaintiff's innumerable answers. For the most part they relate to unimportant and collateral matters. Whether the plaintiff attended a baseball game on a certain date, whether he came to the United States in September or in October, whether a particular conference was on Monday or Thursday of the week, whether he was in New York on a certain date or a month later has little probative value and does not tend to prove or disprove the issues in this case; neither do such statements impeach a witness to the extent on which the defendant insists. *Plaintiff's testimony pertaining to the outstanding issues of this case, corroborated by the other testimony, the documentary evidence, and the undisputed facts is convincing that the plaintiff was employed, was promised compensation and has not been fully paid.*
>
> "In connection with the preceding paragraph attention properly should be directed to some of the testimony and business methods of Hadrath. In view of his position with the defendant corporation and as the leading participant on behalf of the defendant in

negotiating the contracts, and in view of his legal education, he should have prepared a written instrument reciting the contracts in explicit terms, had it properly executed by both parties and have furnished a copy to the plaintiff. By training and experience he undoubtedly knew how to avoid the pitfalls that have resulted in this suit. The agreements for the most part were reached in negotiations in the offices of the defendant where it had available legal talent and a secretarial force. *The thought naturally arises as to whether the way intentionally was left open for advantages that might be gained. It is difficult to conclude that Hadrath believed the plaintiff made two trips to Mexico in which he incurred a personal expense of two thousand dollars, assisted him in important matters necessary to the defendant's entry into the markets of that country without expecting compensation*; * * * also whether Hadrath expected the plaintiff *to obtain the registration of a trade name and bestow title on the defendant gratis.* Furthermore, it must be observed that Hadrath testified at one time that the St. Croix Trading Company was a personal enterprise and that he testified at another time that it was a company matter. There has been no justification for the denial of commissions to the plaintiff on sales made by him and delivered in 1949, *especially in view of the fact that Hadrath in that year drew thirteen thousand dollars through the St. Croix Trading Company as a share in the commissions paid by his employer.*" [Italics supplied.] (Appendix, pp. 17, 18).

It is in the findings that the trial court dealt more specifically with Hadrath's testimony and veracity and documented those findings. In them the trial court explicitly finds that on specific material issues (as to which there were absolute and objective tests of the truth) Hadrath knowingly gave false testimony.[27] Finding 19 can be summarized in only two of its paragraphs:

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[27] Hadrath also testified that he did not know until sometime *after October 30, 1948,* that the trade name transfer to respondent was complete. But he wrote his Venezuelan lawyer who advised

"When Hadrath testified that *he did not know* whether Anthony B. Toro, Jr. received any money or payments from St. Croix Trading Company *he knew* that Anthony B. Toro, Jr. had received substantial amounts.

"When Hadrath testified that the accounting showed *no payments* to Anthony B. Toro, Jr. *he knew* that the accounting showed payments to Anthony B. Toro, Jr., equal to the payments received by Hadrath, or an amount in excess of $13,800.00." (Appendix, p. 44). [Italics supplied.]

That the trial court was justified in these findings on Hadrath's credibility is revealed in various passages of the record relating to other issues. Thus, on the question of whether petitioner had been promised or paid anything for his services in Mexico, Hadrath in pre-trial examination was asked:

"Q. Was any compensation in fact paid by your company to Walter Bitterling for services that related in any way to the appointment of your exclusive distributor in Mexico at that time?

"A. Yes.

"Q. What compensation was paid to him?

"A. Issued a check to him on December 8th, 1945, for five thousand dollars." (R. 451-2).

Later, when confronted, in the course of trial, with documentary evidence from the records of the National City Bank of New York and its Caracas Branch, with the books of Distribuidora, and with letters from respondent's own files which Hadrath was required to produce, Hadrath changed his story. That evidence established that the $5,000.00 was not for Mexico but was an advance on the first

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him on October 2, 1948, that the transfer was completed. Subsequently, Hadrath "double checked" this with his Venezuelan lawyer *on October 28, 1948, just before* he dismissed petitioner. The court also found that Hadrath had knowingly given false testimony about the purpose for which St. Croix was formed. (R. 760, 773, Fdg. 19, Appendix p. 44).

Venezuelan enterprise and that the $5,000.00 went to Distribuidora upon its incorporation for advertising expenses. Hadrath then finally admitted, "If the question is whether he did get paid for that job, [Mexico] *the answer is no.*" (R. 450, Exs. 142 S.R., 143 S.R., 152 S.R.)

It is especially in the evidence concerning St. Croix Trading Company, however, that the question of Hadrath's reliability is most dramatically exposed.

The court below, unlike the trial court, elected to ignore completely the St. Croix Trading Company and everything connected with it. In view of this rather startling factor, a statement of its relevancy to the issue of Hadrath's reliability and veracity, as well as his motives, is in order. No one can read the opinion and findings of the trial court without observing that it was impressed by this episode, by Hadrath's participation, by his obvious motivation of personal gain, by his efforts, first, to conceal its purposes, and then to give false testimony about it, and by the surreptitious, illegal part played by Toro and Stone. Singly, Hadrath's evasive answers and his false answers add up to a deliberate and calculated effort, under oath, to deceive the trial court; collectively, they spell out the real story of Hadrath's motives for dismissing petitioner and for "cutting in" Toro and Stone whose "reports," Hadrath said, led to his decision to dismiss petitioner (R. 505, 511, 512). Toro and Stone, of course, could not lawfully receive commissions from respondent on Venezuelan sales while they were employed by V-BEC. But if any inferences are plain from the record—and fair—they are that Hadrath, Toro, and Stone, apparently convinced that the oil company patronage was secure as a result of petitioner's efforts,[28] and knowing that the vital trade name was irrevocably assigned, agreed that Toro and Stone would give adverse reports on petitioner's performance in

[28] Fraser, Creole purchasing staff, testified: "Orders for powdered milk for the first quarter of 1949 were placed by me *in October 1948.*" (R. 531)

Venezuela and if necessary testify for respondent.[29] In exchange, they would be "cut in" on a share of petitioner's commissions as "silent" or secret partners of St. Croix Trading. All three were aware of the fact that requisitions from the oil companies would assure sustained milk sales in Venezuela on a "pipeline" basis with delivery three to six months or more following the requisitions (R. 527, 531). None knew better than Hadrath, Toro, and Stone that the major oil companies had large requisitions in process in late 1948 for 1949 deliveries and that even if petitioner was dismissed, those deliveries would be made.[30] See *infra*, pp. 35-36. Then it was that these three men in all likelihood formed the "dummy" company even though it was not formalized until some weeks later. The steps were simple:

1. Dismiss petitioner.
2. Set up St. Croix Trading Company.
3. Make a contract between respondent and St. Croix Trading Company to pay 1½ cents per pound to the latter on Venezuelan sales.
4. Conceal Anthony Toro and Stone behind "dummy" names.
5. Pay the 1949 Venezuelan commissions to St. Croix Trading Company, *i.e.*, Anthony Toro, Stone, Hadrath and Maas, the actual "partners."

It was by this devious, yet simple, device that petitioner's commissions, earned in 1948 *before* but not payable until

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[29] Hadrath testified that Stone would appear as a witness at the trial to support respondent's claim that petitioner was discharged for cause. Respondent had Stone in St. Paul at the time of trial but after disclosure of his real part in St. Croix Trading Company, he was not called as a witness. (Appendix p. 7, Fdg. 19, Appendix p. 42).

[30] Creole alone had already made its decision to buy 1¼ million pounds for 1949 delivery. (Exs. 118, 140, not printed). Ex. 140 shows the bulk of 1949 milk was delivered *between January and May 1949*. (V-BEC records)

actual deliveries in 1949, *after* his discharge, were siphoned off and paid to these "partners" who had never turned a hand to earn them. But the scheme was exposed because the auditor's final statement, unlike his monthly statements, carelessly recited the names of the real "partners" and laid the whole scheme bare for the first time in the closing phase of the trial. This explained why Hadrath really wanted to dismiss petitioner, why he really formed this "dummy" company, why he tried to conceal it, why Toro and Stone had been looked to as promising witnesses against petitioner and why their participation had to be covered up.[31]

All of these factors, the five or six occasions of false testimony, and the whole fabric of this shoddy scheme as well, went into the trial court's appraisal of Hadrath's veracity and trustworthiness as a witness. This accountant-lawyer and key witness for respondent, having been observed by the trial court in the flesh, rather than in a condensed narrative record carefully edited by his own counsel, was appraised by the trial court and found wanting.

It is this witness whose testimony was accepted uncritically by the court below without a single reference to his veracity and reliability, or to his part in St. Croix Trading Company.

The following illustrative excerpts from the record bear directly on Hadrath's trustworthiness as a witness:[32]

In pre-trial cross-examination of Hadrath he was asked

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[31] The trial court's opinion states: "To say the least it [St. Croix Trading Company] reveals a very cogent reason why Hadrath and others, may have desired to remove plaintiff from the sale of powdered milk in Venezuela. It reveals the mental attitude and explains the conduct of some of the parties involved. . . ." (Appendix, p. 7)

[32] These excerpts are reproduced because, even condensed and edited, they reveal the quality of the witness better than he can be described.

"What is St. Croix Trading Company."[33] Hadrath's answer was (See [petitioner's] S. R. pp. 4-5):

> "A. There is a company in Houston called the St. Croix Trading Company. I was a partner, but it has since been dissolved. I was one of the partners. There was Mr. Toro, Mr. Maas and Mr. H. R. Friedberg was the fourth one.
>
> "Q. Was the Mr. Toro that you were referring to Mr. *William* Toro, a son or some other relative to Anthony Toro?
>
> "A. Yes, he was."

S. R. p. 17, shows (Hadrath testifying):

> "Q. In your pre-trial answers, in the deposition given on April 21, 1950, this question was put to you:
>
> 'Did *Anthony* Toro receive any payments of any kind from St. Croix Trading Company from the time of its inception up to the present date?'
>
> "Your answer was: 'I don't know.'
>
> "Question: Have you ever had an accounting with St. Croix Trading Company?
>
> "'Answer: Yes.
>
> "'Question: Does that accounting show any payments to Anthony Toro?
>
> "'Answer: No.'"

The undisputed fact, of course, is that when Hadrath answered "I don't know," *he knew* Anthony Toro received money because, as he later admitted, the very idea of St. Croix Trading Company grew out of a meeting between Hadrath, Anthony Toro, and Stone, and all were aware that the latter two were *actual* partners. And when Hadrath answered "No," he had in his possession the very records

[33] This was early in the litigation and before petitioner learned of the true nature of St. Croix. See S.R. pp. 2-31.

which showed Anthony Toro had received about $13,000.00. See *infra*, pp. 29, 30, 31.

Record, pp. 504-505, shows (Hadrath testifying):

> "It is not true that I know as a matter of fact, that Mr. Anthony B. Toro and Mr. Arthur Stone and Sam Maas and R. M. Hadrath were at all times during the life of St. Croix Trading Company the real partners.[34] * * * The $13,000 or other approximate amount which was paid by St. Croix Trading Company *was included in my tax return. The first conversation I ever had* with anybody about the formation of St. Croix Trading Company or a company of any name that would operate as St. Croix Trading Company was on January 14th at the National Canners' Convention in Atlantic City, 1949. I had the conversation with *Sam Maas and Anthony Toro. Anthony Toro was in on the first discussions of the formation of this company.* He was at that time vice president and general manager of CADA and VBEC, who were engaged in distributing merchandise, including foodstuffs, in Venezuela at that time. This is *the same Anthony B. Toro* that reported to me certain things *which contributed, in part at least, to our decision to terminate Mr. Bitterling's contract.* * * * The partnership agreement and contract of St. Croix Trading Company *were dated back to the 3rd of January to include the whole year 1949.* These documents were drawn in Stillwater and signed in Stillwater and in Houston, Texas, and neither Anthony Toro nor Mr. Maas nor Mr. Friedberg nor William Toro came to Stillwater at any time. *Mr. Stoltze, president of Maple Island, knew about the formation of St. Croix Trading Company.* Mr. Toro and Mr. Stone were at the convention in Atlantic City on January 14, 1949. *I talked with both of them at times about the formation of this company. I knew at all times from the beginning that Anthony B. Toro and Arthur Stone were partners in the company.* In giving my answer sixty days ago to the question as to whether or not

[34] Compare this astonishing denial with later admission on cross-examination (bottom lines, *infra*, p. 28) *after* Hadrath was confronted with his own subpoenaed records!

> Anthony Toro got any money at any time from St. Croix Trading Company, I said I didn't know, and I didn't—and I still don't, except on the final accounting. I had the original discussions and conversations as to the formation of the company with the same Anthony Toro, but what happened to his money, I don't know or to William Toro's money, whether he passed that on to him I don't know. In my answer that whatever happened to his money referring to Anthony B. Toro, I didn't know, I meant William S. Toro. He is a young man in his early 20's. *I didn't ever really think he was one of the real partners in the company,* and I never have said I did.[35] [Italics supplied.]

Compare this evasive denial with following contradiction at Record, p. 506 (Hadrath testifying):

> "In my answers to pre-trial questions I said that William Toro and Mr. Friedberg and Mr. Maas and I were the partners, and the partnership agreement so shows. *You didn't ask me at the pre-trial whether I knew at all times that William Toro was merely a front for Anthony B. Toro. I knew that Anthony B. Toro had his son's name, William Toro, in there instead of his own.*[36] *I knew that Mr. Friedberg was there representing Mr. Stone.* When I answered these interrogatories sixty days ago I did not know that it was not true when I said that I didn't know whether Anthony Toro ever got any money; that was my idea of what exactly happened."

Met constantly with this kind of baffling evasion and "double-talk" from Hadrath it becomes plain why the trial court said (Appendix p. 7) that respondent had offered "no satisfactory explanation for the conduct of the parties engaged in it [St. Croix Trading Company] by anyone . . . " Even this condensed record shows how unwilling the respondent was to have the court know "what exactly happened".

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[35] Compare this with last lines R. 498, top lines R. 499.

[36] Compare these admissions with prior denial, R. 504.

Record, pp. 506-7, continuing Hadrath's testimony shows:

> *"I first had business dealings with Mr. Friedberg just* at this time.[37] *I never met Mr. Friedberg,* who is a partner of St. Croix Trading Company, described in Plaintiff's Exhibit 156, and he is the same H. R. Friedberg who is described in the contract with Maple Island Farm, Plaintiff's Exhibit 157. In January 1949 Mr. Arthur Stone and Mr. Anthony Toro were both holding executive positions of high responsibility with the Venezuela Basic Economy Corporation [V-BEC] and its subsidiary, CADA,—Compania Anonima Distribuidora de Alimentos. As a part of their official duties, in fact, one of their chief duties, they handled the matter of making purchases of foodstuffs for their employers, or companies. This morning in my testimony I referred to the fact that CADA and VBEC were described by me, by Mr. Toro and Mr. Stone, in our early conferences in either March or April, 1948, as having been formed to lower and reduce the cost of living to the Venezuelan people." [Italics supplied.]

* * * * *

Record, p. 508 (Hadrath testifying):

> "I did not know just what arrangement Anthony B. Toro and Arthur Stone had with William S. Toro and H. R. Friedberg, because I never asked them. *I knew they had some arrangement. All of my discussions as to the formation of the company actually were had with Anthony Toro and Arthur Stone.* I have never met H. R. Friedberg. *William Toro is a young man of college age* or approximately college age. It is not true that the St. Croix Trading Company was actually formed at the Avilla Hotel on the afternoon of October 30, 1948, Caracas, Venezuela. It was formed in Atlantic City on January 14, 1949.
>
> "After Mr. Bitterling left my room at the Avilla Hotel late in the afternoon of the day on which I terminated his contract, *I had dinner with Anthony B.*

[37] In trial the witness gave this self-contradictory testimony in answer to separate questions. This was typical of his testimony.

Toro and Arthur Stone. I believe I met them in the lobby, and I believe they came to my room immediately thereafter. It is not a fact that St. Croix Trading Company was then and there born. I imagine that *the commissions of Venezuelan business on the sales of powdered milk in the year of 1949 were paid to St. Croix Trading Company in about the same amount that would have been paid to Bitterling* had his contract not been terminated . . ." [Italics supplied.]

Record, pp. 509-510 (Hadrath testifying):

". . . I don't know as I have any answer to the question as to how could Anthony B. Toro and Arthur Stone serve the objectives of the Venezuelan Basic Economy Corporation [V-BEC] in attempting to lower the cost of living to the Venezuelan people by participating in adding $48,000 to the price of powdered milk sold in Venezuela. I don't know. . . ."

Record, pp. 511-512 (Hadrath testifying):

". . . *All of the commissions on the Venezuelan business which were paid by Maple Island Farm in the year 1949 to St. Croix Trading Company would have been paid to Mr. Bitterling had his contract continued through the year 1949, amounting to about $48,714.09.* It was about the same amount we paid the St. Croix Trading Company. * * * "

"I have already testified that Maple Island did not fill Mr. Bitterling's place with any other person. * * * *It is a fact that VBEC simply takes orders of the oil companies on requisitions, in which the oil company specifies the brand* of milk they want. I testified this morning that the function that Mr. Bitterling was to fulfill under his contract *was to persuade the oil companies to specify and designate Valle Verde milk* in their requisitions . . . * * * " [Italics supplied.]

These recitals, being a condensed narrative of the original transcript prepared by respondent's counsel, do not, of course, begin to reflect the true picture presented to

the trial court by the actual testimony. At best, such a condensation is a poor reflection of the total facts drawn piece by piece, step by step, hour after hour, over many days from a very reluctant—and very adroit, clever—witness who, with his legal training, could well anticipate and prepare for cross examination. Reproduced in the condensed narrative form, edited by his own counsel, Hadrath is almost made to appear as a candid, willing witness, whereas in reality the truth, when it came from him, was extracted with great difficulty.[38]

His protest, for example, with respect to St. Croix Trading Company that

> "There was no deliberate effort to conceal it from anyone" (R. 514)

sounds almost sincere, even indignant, until it is laid alongside the testimony of his associate del Mercado, respondent's export manager, who said he *never heard* of St. Croix Trading Company until about September or October of 1949—30 days before it was terminated, and that he never knew *until after this litigation was started* that Anthony Toro and Stone were secret partners (R. 890-2).

Contrary to Hadrath's express denial, even this condensed and carefully edited record shows that the very existence of St. Croix Trading was concealed from del Mercado and its true purpose was concealed from Crane, his associate who drew St. Croix's papers, until cross examination brought it out on trial! Only Hadrath and Stoltze,

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[38] The condensed narrative form suggests that the statements recited were *affirmatively made by Hadrath;* the original transcript will show they were the questions of the cross-examiner which Hadrath reluctantly affirmed. Days were consumed in Hadrath's cross-examination which respondent's counsel reduces to a few pages of condensed narrative, the barest essence of his grudging admissions. *Creamer* v. *Bivert,* 214 Mo. 473, 479, expresses this warning, . . . "one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, *nisi,* believed a word of it . . ."

the general manager and president of respondent, really knew what this "dummy company" was for.

The St. Croix Trading Company episode not only reflects on Hadrath's reliability as a witness but also demonstrates that the termination of petitioner's contract was in bad faith and for the purpose of siphoning petitioner's 1949 Venezuelan commissions to Hadrath, Toro, and Stone. This was done with the full knowledge of Stoltze, who as president of respondent, and owner of 90% of its stock, testified he knew about St. Croix Trading Company and the details of its organization and termination, and affirmed and ratified Hadrath's actions concerning this affair. (Opin. Appendix, p. 7.)

The court below in its opinion states (Appendix, p. 56) that it has made an "exhaustive review of the record" and that it has considered the evidence in the light most favorable to the petitioner. If this be correct, the conclusions reached by the court below represent irresponsible action which this Court should not permit to stand unchallenged; if an "exhaustive review of the record" was not made, it underscores the necessity for re-emphasizing the accepted limitation on scope of review and, more especially, the role of trial and appellate courts as to credibility of witnesses.

II.

Grounds Advanced by Court Below as Justifying Termination of Petitioner's Contract Lack Both Legal and Factual Bases

The trial court found that respondent failed to prove grounds justifying termination of petitioner's contract (Fdg. 17, Appendix, p. 41). The court below disregarded this finding and held that petitioner's act in taking out a patent in his own name on a machine owned by respondent constituted bad faith sufficient to warrant termination of petitioner's contract even if it were a long term contract. It saw something sinister in the petitioner's act in taking out this patent, saying that it "violated his duty of loyalty,

fair dealing and full disclosure to his principal." (Appendix, p. 73.)

The court below stated that petitioner "never informed defendant that he had applied for and patented the machine in his own name" (Appendix, p. 72). In so holding, it overlooked completely that *two of respondent's own exhibits* show exactly the contrary:

(1) on October 17, 1945, before applying for the patent in Venezuela, petitioner wrote respondent (Ex. S, E. p. 51) stating that he was applying for the patent, and

(2) on October 25, 1947, petitioner wrote both Hadrath and del Mercado, stating:

> "I am enclosing herewith copy of drawing made to cover patent protection in this country [Venezuela], along with specifications and claims therein involved. Patent is being taken out in my name, *later to be transferred to Maple Island Farm . . .*" [Italics supplied.] (Ex. L, not printed)[39]

That the court below could regard this as evidence of bad faith warranting discharge is in itself significant because it shows they did not read respondent's own exhibits (Exs. L and S). *All the evidence* submitted by both litigants is contrary to this holding of the court below.[40] Doubly significant is this holding when it is observed that

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[39] This patenting of the Milkmade machine in 1947 is not to be confused (as apparently the court below did) with petitioner's outright purchase of two similar but improved machines in 1948 for resale in Venezuela. See Fdg. 13, Appendix p. 38.

[40] In finding cause for discharge in Bitterling's patenting the milkmade machine, the court of appeals also ignored this Court's admonition in *United States* v. *National Ass'n. of Real Estate Boards,* 339 U. S. 485, that under Rule 52(a) "It is not enough to reverse a finding that the appellate court 'might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court deemed innocent.' "

the acts criticized by the court below in relation to this patent *took place in 1947* and the contract sued on was *not made until 1948*. How a 1947 act by petitioner, twice reported to respondent by him, could be cause for cancelling a contract subsequently made in 1948 was not explained by the court below. Even had petitioner not reported to respondent, that could not affect a *subsequent* contract.[41]

The grounds advanced by the court below as justifying termination of petitioner's contract thus lack both legal and factual bases.

III.

Notwithstanding Reversal of Other Findings, Unreversed Finding 7 Entitles Petitioner to $49,922.34 for Services in Venezuela Less $4,140.54 for Respondent's Counterclaim

The trial court found and the court of appeals did not disturb findings (1) that the deliveries of powdered milk by respondent in 1949 were to fill orders resulting from petitioner's services; (2) that the St. Croix Trading Company was not in good faith entitled to commissions on the 1949 deliveries and did nothing to earn those commissions; and (3) that Bitterling's contract was terminated in bad faith and that his commissions were diverted to St. Croix Trading Company (Conclusion 7, Fdg. 19, Appendix, pp. 44, 45, 48.) Petitioner accordingly is entitled to a minimum compensation measured by the agreed rate of commission on the 1949 Venezuelan deliveries, *i.e.*, $49,922.34.

Petitioner was engaged by respondent not merely to take orders for the sale of its milk but rather to promote the demand for respondent's product sold in Venezuela under the name of Valle Verde (Fdg. 7, Appendix, p. 35; R. 512, 516-18). The district court specifically found that between October 20 and October 30 he [petitioner]

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[41] The trial court, fully aware of respondent's Exs. L and S, and aware that the patenting of this machine *occurred in 1947* and thus before the existence of the 1948 contract sued on, made no specific finding.

conferred with executives of Creole Petroleum Company and other oil companies as to their purchases and asked for estimates of their requirements of Valle Verde for shipments for the last quarter of 1948 and for 1949. Pursuant to petitioner's request, Creole advised petitioner that Creole contemplated buying approximately 1,250,000 pounds of Valle Verde milk in 1949. In 1949 total purchases were made of Valle Verde milk by customers originally secured by petitioner and whose business was solicited on behalf of respondent by petitioner of over 2½ million pounds. The district court found:

> "Venezuela Basic Economy Corp. [V-BEC] did not order powdered milk from [respondent] until orders were received by it from the customers in Venezuela specifying 'Valle Verde' brand" (Fdg. 18, Appendix, p. 41).

Finding 15 (Appendix, p. 40) concludes with this sentence:

> "In 1949 total purchases were made of Valle Verde milk by customers originally secured by Plaintiff [petitioner] and whose business was solicited by [petitioner] as follows:
>
> | | |
> |---|---|
> | Creole Petroleum Company | 1,399,704 pounds; |
> | Shell-Caribbean Petroleum Company | 738,429 pounds; |
> | Mene Grande Oil Co. | 367,930 pounds; |
> | Socony Vacuum Oil Co. | 15,300 pounds." |

The district court found that it was the practice and procedure of the oil companies to order their requirements of powdered milk at least three to six months, or more, in advance of the desired delivery date (Fdg. 20, Appendix, p. 45). The undisputed testimony of Fraser of the Creole purchasing staff was that the deliveries actually made in the *first quarter of 1949* were ordered by Creole *before October 30, 1948.* (R. 531) Neither Finding 15 nor the last sentence of Finding 19 (Appendix, pp. 40, 44-45) was set

aside by the court below nor did it challenge the soundness of the trial court's reasoning that:

> "If the Defendant had the right to cancel the contract when it pleased, that does not mean it could do so, and at the same time cancel the right of the Plaintiff to collect on the sales already made by him. The evidence proves that the plaintiff [petitioner] sold the 2,566,991 pounds of milk delivered in the year 1949 on which he has not been paid a commission. The Plaintiff [petitioner] was entitled to the commissions on such sales in accordance with the scale fixed in the agreement of April 2, 1948." (Appendix, p. 15.)

Instead, it contented itself with holding that the Venezuelan contract was terminable at will and therefore there was no breach of that contract. The court below seemed to think this issue was disposed of by the comment:

> "In 1948 in the relatively short time he was employed by defendant [respondent], he [petitioner] earned and was credited with $55,000.00 in commissions. There could be no fair inference that defendant [respondent] did not adequately compensate him for the services he [petitioner] rendered",

which overlooks, or ignores, the undisputed fact and unreversed finding (Fdg. 18, Appendix, p. 41) *that respondent did not actually pay petitioner one cent of those commissions* but retained them to recoup its "seed" loan.[42]

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[42] Respondent's action as it applies to the $49,922.34 is comparable to hiring a farmer on shares to plough, plant, and reap, his pay to be two cents per bushel on the crop, and then terminating the contract *after* the ploughing and planting is over and just as the harvesting has been commenced.

As applied to the restitution of the $74,626.00, this illustration becomes pertinent if we carry it further and analogize that this tenant farmer had to supply his own fertilizer and seed, purchased with money borrowed from the landlord, who terminates the contract just about the time the tenant has repaid the seed loan out of the first acres harvested.

This was aptly stated in *Axsom* v. *Thompson*, 239 Mo. App. 732, 197 S. W. 2d 326 (1946): "After the brokers have shaken the tree, the sellers cannot run up and bear away the fruit without being liable for the brokers' commission."

But irrespective of whether there was a breach or whether petitioner's contract was terminated for cause, his work, already performed had produced the end result sought in the form of sales for 1949 delivery to the large oil companies in Venezuela, and he could not lawfully be deprived of those commissions. The result of the order of the court below, remanding with directions to dismiss, deprived petitioner of a judgment for money which he had earned and gave respondent a corresponding windfall which it turned over to St. Croix Trading Company for motives discussed elsewhere[43] (see *supra*, pp. 24-26). See *Potomac Chemical Co.* v. *Chapman*, 146 F. 2d 664, 665 (C.A.D.C.); *Tahir Erk* v. *Glenn L. Martin Co.*, 116 F. 2d 865 (C.A. 4).

This unexplained action of the court below furnishes added reason for granting the petition.

CONCLUSION

The court below has so far departed from the accepted and usual course of judicial proceedings, that, for the reasons stated, it is respectfully requested that this petition be granted.

Respectfully submitted,

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[43] More than depriving him of the money he earned, the court below also deprives him of *the very expense he incurred to earn it*, i.e., $74,626.00 (*supra*, p. 16).

FILED
OCT 29 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 308

WALTER BITTERLING, PETITIONER

v

MAPLE ISLAND FARM, INC.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

NO GROUNDS FOR CERTIORARI EXHIBITED

The petition presents no grounds recognized by this Court as recommending review by certiorari. There is no Federal question. No claim is made that the decision sought to be reviewed is in conflict with the decision of another Court of Appeals on the same or similar matter, or that the Court of Appeals decided a state or territorial question in conflict with applicable state or territorial law; nor is any claim made, except parenthetically, that the Court of Appeals so

far departed from accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. The alleged departure is in fact no departure from the usual course of judicial proceeding. The petition does not contend that the Court of Appeals adopted or applied any erroneous principle of law. It does not rest upon any of the grounds of certiorari enumerated in Rule 19 of this Court. Reduced to its essence the sole and simple basis of the petition is the claim that the Court of Appeals erred in holding the decision of the trial Court to be clearly erroneous and in reaching the expressed firm conviction that a mistake was made by the trial Court in its decision. The petition indeed appears to question the honesty and sincerity of the Court of Appeals in declaring itself possessed of such firm conviction. It says that: (p. 17)

> "The Court below *professed to have* that 'firm conviction' in this case",

and by innuendo (p. 14) that the case was decided in the Court of Appeals by "whim, caprice, prejudice or mistake". The integrity of the Court of Appeals is further inpugned by such assertions as (p. 33) that "*if*" the Court, as it stated in its opinion, made an "exhaustive review of the record", then the conclusions reached by the Court represent *"irresponsible action"*,* but that *if* an "exhaustive review of the record" was not made, "it underscores the necessity for reemphasizing the accepted limitations on scope of review" * * *".

The "questions presented" by the petition (p. 2) are two in number, both of which depend upon argumentative descriptions of the decision of the Court below and both of which are based upon assumptions of fact contrary to the

*All italics herein is supplied.

record and contrary to the express determination of the Court of Appeals. Complaint is made that the Court of Appeals retried this *complex* case and that it set aside the trial Court's detailed findings. Then with striking inconsistency the petition urges this Court to do the same thing with respect to the decision of the Court of Appeals.

The Court of Appeals under its general appellate jurisdiction** has the duty as well as the power to review all appealed final decisions of District Courts. This, of course, implies the duty in proper cases to reverse as well as to affirm. The whole system of judicial review is based upon the assumption that trial Courts may err and err with respect to facts. Upon appeals from decisions of District Courts in cases tried without a jury, reversals are required where the findings of fact by District Courts are "clearly erroneous". Such findings are never conclusive and are "clearly erroneous", "when although there is evidence to support them the reviewing Court on the entire evidence is left with a definite and firm conviction that a mistake has been committed".* The Court of Appeals in this case was left with such definite and firm conviction. It said so clearly and emphatically. Any assumption that a reviewing Court, while announcing the presumptions attendant upon the trial Court's findings and its own earnest effort to apply them, is disregarding these very rules of decision, must rest upon something other and different in kind from a party's dissatisfaction with the reviewing Court's decision.

**28 USCA 1296.

*United States v. United States Gypsum Co., 333 U. S. 364, 394-395. The rule of this case has never been modified. United States v. Yellow Cab Co., 338 U. S. 338 (cited in the petition), a direct appeal from the District Court to this Court, does not have that effect.

The petitioner, in effect, is asking this Court to find that the Court of Appeals equivocated when it declared itself to be possessed of that definite and firm conviction and to determine on the contrary that the decision of the Court of Appeals rested upon whim, caprice, prejudice, or mistake.

This Court has many times made clear that it will not grant certiorari merely to review conclusions of Courts of Appeal on issues of fact. It has said:

"We do not grant certiorari to review evidence and discuss specific facts."

—*United States v. Johnson*, 268 U. S. 220, 227.

"This is not the place to review a conflict of evidence nor to reverse the Court of Appeals because were we in its place we would find the record tilting one way rather than the other, so fair-minded judges could find it tilting either way."

—*National Labor Relations Board vs. Pittsburgh Steamship Co.*, 340 U. S. 498, 503.

"Proper decision of the controversy depends on the question of fact. * * *

"It now appears to us that this matter of fact is of no general importance. Accordingly, we adhere to the usual rule of non-interference, where conclusions of certain Courts of Appeal depend upon appreciation of circumstances which admit of different interpretations."

—*Federal Trade Commission v. American Tobacco Co.*, 274 U. S. 543, 544.

II.

WEIGHT OF TRIAL COURT'S FINDINGS

The Court of Appeals recognized the usual rule as to the weight of the findings of a trial court. It said that after an exhaustive review of the record and considering the evidence in the light most favorable to the prevailing party, it was firmly convinced that the findings were clearly erroneous and that the decision of the District Court was the result of a mistake. The Court of Appeals would have been warranted in attaching less than usual weight to the findings reviewed. The presumption in favor of the findings of a trial court presupposes findings representing the conclusions of a court which had a reasonable understanding of at least the issues, the position of the parties, and the admitted facts in the case. The opinion of the trial Court in this case negatives such understanding in many essential particulars. This will be later demonstrated in detail on pages 47 to 54 of the appendix.

III.

CORRECTION OF MISSTATEMENTS

Of the many misstatements to be found in the petition, two should be noticed here, for they have been built upon largely as a foundation of petitioner's whole argument.

1. Five times in the petition the assertion is repeated that the case was considered and decided upon "an *abridged* narrative record". The record is referred to as "a *condensed* narrative record" and again as "a condensed narrative record carefully edited by his own [respondent's] counsel". It was quite obviously intended by this to convey the impression

that not only was the testimony reduced to narrative form as required by the rules of the Court of Appeals of the Eighth Circuit,* but that the narrative, as such, was abridged, condensed and incomplete. The truth is that the entire testimony of every witness was included in the narrative. Although a rule of the Eighth Circuit permitted petitioner** to file a supplemental record if he considered the printed record submitted to be inaccurate or insufficient. Until the present petition was filed no suggestion ever came from counsel for petitioner that the record before the Court of Appeals was not full, complete and accurate, with the single exception of one complaint in his brief below that the narrative did not adequately reflect the significance of the question and answer testimony, on cross-examination of one of respondent's witnesses, and this complaint petitioner made the occasion for including this testimony in a supplemental record in question and answer form as recorded by the official court reporter. With the filing of this supplemental record the testimony in question was placed before the Court of Appeals precisely as petitioner wanted it. That supplement is before this Court identified as such.

Furthermore, on respondent's request, under a rule of the Court of Appeals, *** there was lodged in that Court, prior to the argument, the entire reporter's transcript of the evidence and proceeding in the trial Court, without abridgement or condensation, together with every original exhibit

*Rule 10(b)

**The word "petitioner" is used to refer not only to the petitioner in this Court but also to Bitterling as plaintiff in the District Court and as respondent in the Court of Appeals. "Respondent" refers to Maple Island Farm as respondent in this Court, defendant in the District Court and appellant in the Court of Appeals.

***Rule 8(d)

received in evidence at the trial. Respondent caused to be printed and filed in the Court below 62 of these exhibits; petitioner printed and filed 18 additional exhibits, as a part of his "Supplemental Record". No appellate Court could have or had before it a more complete record for the purpose of reviewing the decision of a trial Court.

2. Six times in the petition petitioner reiterated, with slightly varying phraseology, the claim that an evaluation by the Court of Appeals of the weight of the evidence "depended entirely on the credibility of the two key witnesses," referring to petitioner and Reuben N. Hadrath, general manager of respondent. The petition adds "but the decisive factor in this controversy is the question of credibility of two opposing key witnesses".

The case does not on any point rest upon the relative credibility of these two witnesses. Other than these two, fourteen witnesses testified, eight orally in Court and six by depositions. Received in evidence also were 386 documentary exhibits, many of great evidentiary importance, some quite decisive on major points. In no instance will it be found that the Court of Appeals based its conclusion upon the testimony of either of these two witnesses except as that testimony was corroborated and confirmed by other evidence or as the contrary testimony was impeached by other evidence. Such other evidence included, as mentioned, evidence in documentary form not subject to contradiction.

The petition several times complains that the Court of Appeals tried the case *de novo*. There was no more a trial *de novo* than occurs when any appellate court makes an exhaustive study, analysis and review of the record of a trial court and bases its decision thereon.

IV.

PETITIONER'S ARGUMENT ON WEIGHT OF EVIDENCE

The petition so clearly fails to make a case for certiorari that a discussion of the evidence may be to no purpose in this brief in opposition, the function of which is the "disclosing any matter or ground why the cause should not be reviewed by this Court". The petition itself fails to disclose any matter or ground why the cause should be so reviewed. Nevertheless, petitioner's argument regarding the evidence and the decision of the Court of Appeals is so fallacious and misleading that silence cannot be permitted to suggest acquiescence. Since, however, this is something quite apart from the essential matters and grounds against certiorari, the answer to the petition in this respect will be set apart by its inclusion in an appendix hereto.

It is submitted that the petition should be denied.

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APPENDIX

STATEMENT OF CASE

The transactions upon which petitioner's action was based and the periods of time involved need explanation in clearer and more accurate outline than is afforded by the petition.

Petitioner in his complaint pleaded two causes of action, one for commissions, under an alleged oral agreement, on powdered milk sold by respondent in Mexico, the other for damages for breach of an alleged oral agreement by respondent to pay petitioner commissions on powdered milk sold by respondent for shipment into Venezuela. The agreement in relation to Mexico was claimed by petitioner to have been made on November 24, 1945, and commissions were claimed to have accrued, under the agreement, on sales in 1946, 1947, and 1948.

The Venezuelan agreement was alleged to have been made in April and May of 1948. (5-9)* Plaintiff's employment by respondent was terminated on October 30, 1948, so that the entire period involved in the Venezuela claim is from April to October, 1948. The period from September, 1945, to April, 1948, has no bearing upon the Venezuelan claim, except that during that period a trade name was adopted by respondent, which petitioner claims, but respondent denies, was an element in the 1948 agreement.

The arrangement under which the Venezuelan corporation Distribuidora Valle Verde (owned originally by respondent, petitioner and an associate, and later by petitioner and associates) purchased milk powder from respondent and resold

*Figures in parenthesis, unless otherwise indicated, refer to pages of the main record.

it in Venezuela between mid-1946 and April, 1048 (referred to on pages 8 and 9 of the petition), is therefore not involved.

Petitioner claims respecting the trade name are stated *as facts* on pages 10 and 11 of the petition, although contrary to the record, as hereafter shown, and contrary to the conclusions of the Court of Appeals.

For all Venezuelan services rendered during the period from April to October, 1948, the trial Court gave the petitioner judgment for $49,922.34 as the reasonable value thereof (1025-1026) notwithstanding that respondent, as the Court found, had paid petitioner for the same period $55,950.58 (1019), or $6,028.24 in excess of the reasonable value as found.* To sustain this quantum meruit judgment, other considerations aside, it would be necessary to suppose that the value of petitioner's intermittent services over the brief period of his April to October employment was not less than $105,872.92. In addition to the $49,922.34, petitioner was given judgment for $74,626.00 to reimburse him for money alleged to have been paid out by him to procure transfer to respondent of the trade name "Valle Verde", which according to the record and according to the opinion of the Court of Appeals was at all times the property of respondent, al-

*Finding 23 reads in part: "Between April 2, 1948 and October 30, 1948, Plaintiff performed services and paid consideration to and conferred benefits on Defendant at its special instance and request, which services under all the circumstances and independent of any express contract have a value of $49,922.34 and which was due and payable to Plaintiff December 31, 1949". (1023)

Finding 18 (last sentence) reads: "During the period prior to October 30, 1948, Plaintiff's commissions earned and computed as aforesaid amounted to $55,950.58, and the total amount of his commissions was in fact credited to Plaintiff's account in Stillwater by the Defendant with the effect of reducing to $4,140.54 the amount which Plaintiff owed to Defendant as a result of Defendant's advance." (1019)

though registered in Venezuela in the name of a Venezuelan corporation because of circumstances hereafter related.

In reversing the decision of the District Court, the Court of Appeals remanded the case to the District Court with directions to dismiss. No stay having been asked for or obtained by petitioner, a judgment of dismissal was entered in the District Court on April 26, 1954.

Mexican Claim

The evidence bearing on this claim is so accurately reviewed by the Court of Appeals in its opinion* that little need be added. The claim is based upon an alleged oral agreement testified to by petitioner as having been made between himself and Reuben N. Hadrath, respondent's general manager, while on an airplane en route to Mexico City November 24, 1945. Petitioner's testimony was that on the occasion in question he said to Hadrath that he felt "that we should come to an immediate agreement on some basis, working basis, by which I would receive remuneration for the work to be done in the future"; that he told Hadrath that "considering the work that had been done and would be done in the future, in my opinion the payment of one cent per pound for all milk shipped into Mexico would be a reasonable agreement"; that Hadrath said, "I don't think that is out of line. I think we can come to an agreement and I will talk to Mr. Stoltze [president of respondent] and verify it when we return to Stillwater". (37-38) There is no evidence or finding that Hadrath ever did confirm the proposal with Stoltze. Hadrath denied the conversation and denied having communicated any such conversation to Stoltze, and Stoltze testified that he never heard of such proposal or agreement. (690-691,

*Appendix to Petition, pp. 54-59.

693, 802) There was no evidence that Hadrath had any authority to make such an agreement on behalf of respondent, except that he bore the designation of "general manager," which is no evidence as to the extent of his authority.

There is no serious claim that petitioner had, prior to the alleged conversation with Hadrath, rendered any substantial service in relation to Mexico, and there is no claim, testimony, or finding that petitioner agreed to render any services subsequent to that conversation.

Payment for Petitioner's Mexican Services and the Petition's Palpable Misstatement of Testimony Regarding It

Upon return from the Mexican trip respondent issued to plaintiff a check for $5,000, which respondent claims included payment for petitioner's Mexican services. That it did include such payment is fairly evident from petitioner's own response to a pre-trial interrogatory; that was one of the purposes for which the payment was asked by petitioner. (46-47; 695) For three years thereafter and until preparation for commencement of this suit, petitioner never made any demand or request for any other or different payment for his services in connection with the Mexican transaction.

On a pre-trial discovery deposition taken on behalf of petitioner inquiry was made of Hadrath regarding the matter and being forced to give a yes or no answer to a question which Hadrath protested could not be answered yes or no, he said:

> "I can't answer that yes or no. If the question is whether he did get paid for that *particular* job, the answer is no." (450)

Immediately following this came these questions and answers by Hadrath:

Q. "Was any compensation in fact paid by your company to Walter Bitterling for the services that related in any way to the appointment of your exclusive distributor in Mexico at that time?"

A. "Yes".

Q. "What compensation was paid to him?"

A. "Issued a check to him on December 8, 1945 for $5,000."

Again:

Q. When the check was paid December 8, 1945, was it to cover something other than payment for services in Mexico or was it for payment in Mexico?"

A. The check itself was given to Mr. Bitterling because he advised me he had been put to a great deal of expense in going to Mexico and would be put to a great deal more expense in starting up in Venezuela; that he didn't have much money,—'Would we advance him $5,000.00?'—which we agreed to do, and in that case part of it did cover his compensation for Mexico and part of it for Venezuela. As it turned out, he used the check for another purpose." (452-453)

Considering all the testimony on the subject by Hadrath, t is clearly apparent that what he meant by the first answer n saying that petitioner was not paid for that *particular* ob was that the Mexican job was not singled out for separate ayment apart from the other things mentioned in his subequent answers; that they were all covered by a common ayment.

Attention is now invited to what is said in the petition on he subject of this testimony. After referring to the second

and third questions and answers above quoted, the petition proceeds (p. 23):

> "Later, when confronted, in the course of trial, with documentary evidence from the records of the National City Bank of New York and its Caracas Branch, with the books of Distribuidora, and with letters from respondent's own files which Hadrath was required to produce, Hadrath changed his story. That evidence established that the $5,000.00 was not for Mexico but was an advance on the first Venezuelan enterprise and that the $5,000.00 went to Distribuidora upon its incorporation for advertising expenses. Hadrath then finally admitted, 'If the question is whether he did get paid for that job, (Mexico) the answer is no.'"

This is a complete misrepresentation of the testimony and the facts in relation to it. First, although assuming to quote the first answer verbatim, the petition omits the significant word "particular" before the word "job". Next, this answer is represented to have been given *at the trial* and as a retraction, and "change of story" *after Hadrath was confronted at the trial* with documentary evidence, etc., whereas in fact, as above pointed out, the answer was given not at the trial but on a pre-trial deposition taken more than a year before the trial and was followed in the selfsame deposition by Hadrath's testimony that plaintiff *was* paid for his Mexican services and other things with the $5,000 check. There was no "change of story" at the trial or at any other time. The documents with which Hadrath was "confronted" at the trial were not produced until more than a year after the testimony was given, which the petition claims was compelled by this confrontation, and when presented at the trial the documents were evidence of nothing but the fact

that the $5,000 was ultimately used for advertising purposes by the Venezuelan corporation Distribuidora Valle Verde (in which petitioner and an associate held a 51 per cent interest), a fact never disputed by respondent and a fact not contradictory of the proof as to the original purpose of the payment. The president of respondent also testified regarding the $5,000 payment. (802)

When there is added to the other evidence regarding the Mexican claim, the facts established by the record and noted by the Court of Appeals, that petitioner's main objective in the 1945 negotiations was to obtain an arrangement under which petitioner's Venezuelan corporation might sell respondent's powder milk products in Venezuela; that the Mexican matter was but a minor incident; that all the time devoted to it by petitioner was borrowed from his Venezuelan employer to whom he was bound for full time services and by whom throughout the period he was paid full time compensation; that for three years after the Mexican agreement is alleged to have been made it was never mentioned between the parties, and so far as the evidence shows was never mentioned by petitioner to any living person; that although, had the alleged agreement existed, large commissions had accumulated beginning in 1946, petitioner never asked for or asserted any right of payment until immediately preceding the commencement of this suit in 1950; that petitioner on the trial admitted that he probably would never have made any claim against the respondent for Mexican commissions had he not been discharged from the Venezuelan employment (150-151); that his explanation of his silence regarding his alleged Mexican commissions was utterly ludicrous and incredible. (146-169), the conclusion of the Circuit Court was inevitable that "a judgment of one cent per pound

for services in connection with the Mexican sales was clearly erroneous and cannot be allowed to stand," (Appendix 56), and that "the judgment for $26,883.91 on the first count was against the clear weight of the evidence and must be reversed as being clearly erroneous under Rule 52(a)". (Appendix 59) Two additional factors may have contributed to the Court of Appeals consideration of the trial Court's decision, one the demonstrated untrustworthiness of petitioner as a witness and the obvious confusion and lack of understanding on the part of the trial Court as to the issues, evidence and positions of the parties. These matters will be developed later.

Venezuelan Claim

In April of 1948, superseding the previous arrangement with the Venezuelan corporation Distribuidora Valle Verde, respondent engaged as its distributor in Venezuela the Venezuela Basic Economy Corporation and an oral agreement was made with petitioner under which he was to act for respondent as a promoter of respondent's sales in Venezuela. He had no duty or authority to actually take orders or make sales. He was to be paid commissions on an agreed sliding scale on the powdered milk which respondent should sell for exportation into Venezuela. The commissions were payable regardless of whether the sales were in any degree attributable to or influenced by petitioner's "promotion" efforts. So far there is no dispute regarding the agreement. Petitioner, however, claims that this agreement for payment to him of commissions was to continue without limit so long as respondent should continue to sell powdered milk for shipment to Venezuela. Respondent says that the duration

of the employment was left open and that it was terminable at any time by either party. Petitioner does not dispute that the agreement was terminable at any time by him, but claims that it was not so terminable by respondent. This employment continued until October 30, 1948, when it was terminated by respondent.

The Court of Appeals held, first, that the agreement was not to pay petitioner commissions on Venezuelan sales *so long as respondent continued to sell its powdered milk product in that country,* but was terminable at the will of either party, and, second, that in any event respondent had ample cause for the discharge of petitioner in October, 1948. The finding of the trial Court to the contrary was held to be clearly erroneous. (Appendix 67-74)

The evidence regarding the Venezuelan agreement is so voluminous as to preclude a detailed discussion. However, the following outline of ultimate facts, largely undisputed, not only sustains but impelled the conclusions of the Court of Appeals.

(a) Petitioner's claim as to the duration of respondent's obligation to pay commissions rests solely upon the oral testimony of petitioner, given in different and contradictory versions, unsupported by a written word or by the oral testimony of any witness or by any word or writing of any person.

(b) No such claim as to duration was pleaded in petitioner's original complaint but, as the Court of Appeals observed, this claim was added as an afterthought in an amended complaint. (2-3, 7). No explanation was offered for its omission from the original complaint. Plaintiff, in response to a pretrial interrogatory, swore that he was engaged on the terms of the original complaint (317-318, 394), with which he was familiar, and on the trial he testified that he still thought that to be true (394).

(c) Plaintiff's claim as to the duration of the commission payments was positively denied by Hadrath, the person with whom petitioner claims the agreement was made (490-491).

(d) Petitioner's claim as to duration was inconsistent with his statement to his business associate Carlos del Mercado shortly following the agreement, to the effect that the duration of his arrangement with respondent was indefinite. This was the testimony of del Mercado not denied by petitioner. (840) The matter was of special interest to del Mercado because he and petitioner had just formed an arrangement for a fifty-fifty division of the combined earnings of both. (834-835)

(e) Respondent had a fixed policy against long term contracts of employment. (800, 441-442, 825-829)

(f) Petitioner's whole attitude toward his employment shows that he regarded it as temporary. More will be said of this in connection with the subject of petitioner's discharge.

(g) When discharged petitioner did not question plaintiff's right to terminate the employment. While petitioner, contrary to Hadrath, claims he used the term "breach" of the contract, it appears that if he used the term "breach" it was used in the sense of termination for, in his own words, he said to Hadrath, "If you break the contract as of this date I probable owe you some money." (129)

(h) Shortly after his discharge, in a letter to del Mercado (defendant's Exhibit Z-9), petitioner referred to his discharge as "to be expected" but as not having been expected so soon. (850) Petitioner was unable to give any explanation of this letter consistent with his claim as to the agreed duration of his employment. (361-363) With reference to this

letter del Mercado explained that he and petitioner had discussed many times that the relations of both with respondent were very insecure.

(i) According to Hadrath, petitioner, at the time of the termination of his employment, announced that he was going to sue VBEC (Venezuela Basic Economy Corporation). (736) Petitioner admitted that he probably did say that. (373) He made no threat of claim or suit against respondent.

Every statement in this outline is amply supported by the record. From the relevant evidence the Court of Appeals could not, with any proper regard to the proof, come to a conclusion other than that stated by it in the words:

> "Examination of the record has led to the firm conviction that in truth and in fact Hadrath did not employ the plaintiff 'for so long as defendant continued to export to Venezuela'." (Appendix 70)

The Court then noted the fact that

> "The written opinion of the trial court indicated that it was not persuaded that Hadrath had done so. In the opinion, the Court noted the flat contradiction between plaintiff's claim to having made such an agreement and Hadrath's positive oath to the contrary, and said in respect to it *'Fortunately, it is unnecessary to borrow trouble by deciding this dispute.'* However, in the findings prepared by counsel and signed by the Court on the same day it found that 'defendant agreed to pay plaintiff a commission based on exports into Venezuela each year so long as defendant continued to export into Venezuela. * * *'" (Id.)*

*The passage in which the trial Court disclaimed any intention to resolve the dispute between the testimony of petitioner and Hadrath regarding the duration of the employment will be found on page 992 of the record. The simultaneous finding resolving the dispute in favor of petitioner is found on page 1012 of the record.

In addition to the foregoing, and on mixed questions of fact and law, the Court of Appeals held that Hadrath had no authority on behalf of respondent to make such an agreement as claimed by petitioner, and that such an agreement, if assumed to be made by Hadrath, would so far as executory be unenforcible for lack of mutuality, and finally that in any event petitioner's discharge by respondent was for just cause. (Appendix 67-70, 71-74)

As to Hadrath's authority the record is silent. The burden to show it was upon petitioner. Having failed to sustain that burden, the Court of Appeals had no discretion but to hold in the negative. As to mutuality, since petitioner admittedly was serving at will there could be no mutuality, at least none without independent consideration, of which there was none. This point, as well as justification for petitioner's discharge, will be separately discussed later.

Item of $49,922.34

The petition claims that the allowance of this amount to petitioner by the trial Court was not reversed by the Court of Appeals. After discussing the item and the claims of the parties with respect to it, the Court of Appeals said:

> "Examination of the record convinces us that the defendant's contentions are well taken and that the judgment for $49,922.34 is so clearly erroneous as to require reversal." (Appendix pp. 66-68)

Probably nothing more need be said, but a brief explanation of the nature of the claim may be of assistance.

Petitioner's agreed compensation consisted of commissions on powdered milk sold by respondent for shipment to Venezuela. The employment, as the Court of Appeals properly

concluded, was terminable at the will of either party, and was in any event terminated for just cause. It was terminated on October 30, 1948. Petitioner rendered no further service after that date and does not so claim. He was paid in full all commissions accruing to him during his period of employment. That was the full measure of respondent's obligation under the agreement. The petitioner sued for damages for breach of the agreement. The trial Court, ignoring petitioner's theory of the nature of his action, and with subsequent approval of petitioner, assumed to determine the value of petitioner's services and found the value to be $49,922.34 (1023, finding 23) and also found that for these services petitioner was paid $55,955.58, or $6,033.24 in excess of the value (1019, finding 18). Despite this excess, and ignoring all payments by respondent, judgment as for the reasonable value of petitioner's services was awarded in the sum of $49,922.34. But says the petition the comment of the Court of Appeals "overlooks or ignores the undisputed fact and unreversed finding * * * that respondent did not actually pay petitioner one cent of those commissions but retained them to recoup its "seed loan". The petitioner seems to see an important difference between the legal effect of applying the commissions to the liquidation of petitioner's indebtedness to respondent and payment directly to petitioner leaving the indebtedness outstanding.

Petitioner has made the belated claim that the findings do not mean what they say and that what the trial Court meant was that petitioner's services were worth $49,922.34 *in addition to* the $55,955.58 paid him, which would place a value upon his services (over some portion of seven months) of $105,877.92, a sum so outrageously excessive as to be false on its face.

In justification of the judgment with respect to this item, the petition quotes the trial Court's opinion as follows: (Petition p. 37)

> "If the Defendant had the right to cancel the contract when it pleased, that does not mean it could do so, and at the same time cancel the right of the Plaintiff to collect on the sales already made by him. The evidence proves that the plaintiff sold the 2,566,991 pounds of milk delivered in the year 1949 on which he has not been paid a commission. The Plaintiff [petitioner] was entitled to the commissions on such sales in accordance with the scale fixed in the agreement of April 2, 1948." (Appendix, p. 15)

This is one of the many proofs* of the utter confusion of mind on the part of the trial Court respecting the claims of the parties and the evidence, a confusion which accounts for the otherwise incomprehensible decision of that Court. From the above quotation it is apparent that the trial Court thought petitioner who was discharged on October 30, 1948, had sold respondent's powdered milk throughout 1949. The sum of $49,922.34 is arrived at by applying petitioner's commission rate to the 2,566,991 pounds of respondent's Venezuelan sales in 1949. To restate the facts in that connection, petitioner never sold or claimed to have sold a single pound of respondent's milk at any time, either in 1948 or 1949. His commissions were not paid for making sales of milk. They were paid upon Venezuelan sales by respondent, regardless of whether petitioner's "promotion" work in any way aided the sales or not. The findings of the trial Court (prepared by counsel) expressly say that "The plaintiff was not engaged to take orders but rather to promote the demand for

*Many others are pointed out on pages 47 to 54 post.

defendant's products * * *". (1007) No one except the trial Court ever claimed or thought that he was engaged in any other capacity.

The trial Court undertook to evaluate petitioner's services, although there was no evidence of such value. As shown above, petitioner's 1948 services, terminating on October 30, 1948, were assigned a value equal to petitioner's commission rate applied to respondent's 1949 sales. This commission rate as applied to the sales of either 1948 or 1949 was no index of the value of petitioner's services for the reason, among others, that petitioner testified that the commissions were not intended as payment only for services to be rendered, but were in payment "for a lot of things that I had done and hadn't been paid for. It was to a great extent payment for past services." (825)

If the award to petitioner by the trial Court of $49,922.34 was prompted by any idea that the Venezuelan sales made by respondent in 1949 were the result of petitioner's services between April and October, 1948, the award is predicated upon an absurdity in the light of the evidence, which shows all but conclusively that the 1949 sales were at least in the main attributable to the distributorship of Venezuela Basic Economy Corporation and a special price concession by respondent to that distributor (721-726) as a result of which respondent's Venezuelan sales jumped from a combined total of 823,457 pounds in the last half of 1946 and 1947,* to 2,811,102 in 1948, and 2,566,999 pounds in 1949. (Defendants' Exhibit Z-74; 790, 721-726)

*Under the distributorship of Distribuidora operated by petitioner and his associate.

The Trade Name "Valle Verde"

The trial Court allowed petitioner $74,626 as the alleged cost to him of procuring the transfer of the trade name Valle Verde from the Venezuelan corporation Distribuidora Valle Verde, owned by petitioner and his associates, to respondent. The Court of Appeals found from the evidence that this name belonged not to petitioner or his corporation but to respondent; that there was no actual or implied agreement on the part of respondent to pay petitioner for obtaining the transfer to respondent, and that no expense incurred by petitioner in that connection would be a proper element of damage for the breach of petitioner's employment agreement even on the assumption that there had been such a breach.

The Court of Appeals, in an apparent effort to keep its opinion within reasonable bounds as to length, omitted reference to a great deal of evidence supporting these conclusions. Some amplifications may be permissible.

The officers of respondent testified that before they ever saw petitioner they had discussed a trade name for their product. Respondent's farm was located in a beautiful valley called "St. Croix Valley", and not unnaturally the word "valley" figured prominently in the choice of a name. Suggestions were made of "St. Croix Valley", "Friendly Valley", and "Green Valley". After petitioner arrived from Venezuela he was included in the discussion. He suggested for use in Spanish speaking countries the Spanish translation of "Green Valley", which is "Valle Verde". (684-686, 778-779) While petitioner claims that before leaving Venezuela he instructed his partner to register such a name in Venezuela, it was shown that his partner did not register it, and that it was not registered until done at the instance of re-

spondents some nine months later. (190-194) There is every indication that no such instruction was ever given. At the 1945 conference in Stillwater attended by petitioner the conclusion was reached to use the name "Green Valley" in the domestic distribution of defendant's products and the name "Valle Verde" in Spanish speaking countries. It was found, however, that "Green Valley, was pre-empted in the Patent Office in Washington and respondent was advised by a patent attorney in Washington that the name "Valle Verde" could not be registered by respondent in Venezuela until first registered in the United States after that right had been acquired by user in this country. (Defendant's Exhibit Z-54; 686,779, 781-782) In countries not requiring prior registration in the United States, respondent, with full knowledge and without objection from petitioner, proceeded to register "Valle Verde" in respondent's name. There were eleven such countries, being those listed in the letter of the patent attorney. (Defendant's Exhibit 54) The only reason why the name was not registered in the first instance in respondent's name in Venezuela, as was done in these other countries, was the opinion of the patent attorney that this could not be done. As noted by the Court of Appeals, petitioner in June of 1946 sent a cable from Stillwater to his partner, Casulleras, in Venezuela directing him to register the name "in order to protect Maple Island". (Defendant's Exhibits F-1, 2 and 3; 192-193).* This was a definite acknowledgment that it was respondent that was protected by the name. All evidence points to the conclusion that it was understood by everyone concerned that the name was

*The first sentence of the cablegram read: "Register name Valle Verde immediately Venezuela in name of Compania Distribuidora if possible or you personally if necessary in order to protect Maple Island, perfecting transfer later.

the property of respondent. In answer to petitioner's cablegram Casulleras wrote respondent that the registration *"has to be* applied for under my own name. * * * It could be done under the Company's proper name provided a special authorization be granted by the Board of Directors and that would cause a considerable delay." (Plaintiff's Exhibit 47) Accordingly, the name was originally registered in the name of Casulleras.

In October of 1947 respondent, having parted with its interest in Distribuidora, was no longer content to have the registration stand in the name of Casulleras, and Hadrath wrote petitioner: "Mr. Stoltze [president of respondent] insists that the Valle Verde name be transferred to Maple Island Farm, Inc., at your convenience. Will you arrange to have this done when you can?" (Plaintiff's Exhibit 89) To this petitioner replied: "I will take care of the transfer of the name mentioned in your letter." (Plaintiff's Exhibit 90) Repsondent was never advised that this promise was violated, although within a month petitioner had signed an acceptance of the transfer of the name to Distribuidora Valle Verde owned by petitioner and his associates. On the contrary, between that date and March, 1948, petitioner repeatedly assured respondent that the transfer of the name to respondent was in process and was delayed only by the slowness with which Venezuelans moved in such matters. (801) Petitioner's explanation of his breach of promise to transfer the name to respondent was too feeble to be worthy of any consideration. (194-198) It cannot be regarded otherwise than as a flagrant act of duplicity and bad faith.

There are in Venezuela two kinds of trade-marks or names for the purpose of registration. One is "marca de fabrica" or "factory mark", which only manufacturers or producers

are permitted to register for protection of their rights, and the other is "marca commercio" or "commercial mark", registerable by dealers for their protection in the distribution of products manufactured by others. (577-579) The trade name "Valle Verde" was registered as a "marca fabrica" or "mark of factory". All shipments of respondent's products to Venezuela were in cans bearing the label "Valle Verde", coupled with the legend, in Spanish, "North American product manufactured by Maple Island Farm, Inc., Stillwater, Minnesota" (Defendant's Exhibit Z-70; 744, 577-579). Under the form of registration the trade name was capable of ownership under Venezuelan law only by a manufacturer (577-579; Plaintiff's Exhibit 167). This is in harmony with American law, under which there can be no ownership of a trade-mark or trade name except as a right appurtenant to the owner's product or established business.

The Court of Appeals found that there was no agreement, express or implied, by respondent to reimburse petitioner for any expenditure to induce his associates in Distribuidora to consent to the transfer of the trade name. There is substantial agreement between petitioner and respondent's general manager Hadrath that Hadrath met the suggestion that petitioner's associates were claiming ownership with an unequivocal denial of such ownership, affirmance of respondent's ownership, and an unqualified refusal to pay a dollar for the return of the name to respondent; that if petitioner paid anything it would be upon his own responsibility. Petitioner admitted that Hadrath told him respondent would not pay a dime; that Hadrath said, "We won't give them a damn cent", referring to petitioner's associates. But Hadrath also took the position that unless petitioner arranged in

some way for the transfer of the name to respondent as petitioner had long previously promised to do, petitioner would have no further employment with respondent. (110, 321-322, 485, 489, 646, 711-12) It is too clear by petitioner's own testimony to admit of any doubt that he undertook procurement of the trade name for respondent upon his own responsibility, with no promise or expectation of reimbursement from respondent, but with a purpose of transferring the name to its true owner and of complying with a condition precedent to his employment imposed by respondent. (98, 110-111, 272, 375-376, 394) The nature of this transaction was in no way affected by the fact that, at the solicitation of petitioner, respondent credited the account of Distribuidora Valle Verde with the sum of $50,000 in consideration of petitioner's personally assuming liability to respondent in that amount.

The Court of Appeals could not, without completely closing its eyes to the record, do otherwise than it did in reversing the trial Court as to this claim of $49,922.34.

Cause for Discharge

If petitioner's employment was at will, its termination requires no justification. If justification were necessary it is amply supplied by the record. On this point the Court of Appeals said in its opinion:

> "Since the contract was terminable at will by either party and no liability attached for such termination, it would be unnecessary to consider whether defendant had just cause for discharging plaintiff. However, in view of the fact that it may seem plaintiff was unjustly treated in being summarily discharged after only a few months service, we refer briefly to the circumstances

under which the termination was effected." (Appendix p. 71)

It thus appears that the Court of Appeals did not consider cause for discharge essential to its decision, but added its finding on that subject as additional moral justification for the discharge. The causes shown by the evidence include many facts beyond the very condensed statement by the Court.

As said by the Court, petitioner, when employed by respondent "agreed to devote his full time and best efforts to this work and to divorce himself from his numerous other activities". (Appendix 71-72) Petitioner never disputed that he agreed to devote full time to the employment. He could not say otherwise without invalidating his agreement, for if he was not bound to devote full time to his employment there is no evidence as to what or how much time (less than full) he was to give to his work, and the agreement would be thus invalid for uncertainty and indefiniteness.

Petitioner breached his agreement. He did not at any time give his full time to his employment and he did not divorce himself from other business concerns and activities, but on the contrary was constantly engaged in efforts to make new business connections, develop other lines of business, and expand his business activities, both on his own behalf and on behalf of his Ultramar Company, all in disregard of his duty to respondent.

Petitioner was engaged to work *in* Venezuela. He went there about April 15, 1948. About May 1 he returned to the United States. (290) He remained in the United States the entire month of May, visiting in New York, attending an oil show in Oklahoma, discussing with Hadrath in Stillwater

his proposal for liquidation of Distribuidora, and some other things. (318-320) He arrived in Venezuela on or about June 1 and, so far as the evidence shows, remained there until September 5, when he again returned to the United States and remained in this country until October 20. Thus from the time of his employment in April until his discharge on October 30, plaintiff spent at least two and one-half months in the United States. Any work done by plaintiff in his short stay of two weeks in Venezuela in the last half of April was negligible. To all intents and purposes his performance can be considered as beginning on June 1, when he returned to Venezuela after his stay of one month in the United States. Of the five months between June 1 and October 30, one and one-half months or thirty per cent of the time was spent in the United States. On the occasion of his trip to the United States from September 5 to October 20, he did not ask respondent's permission to come. He told respondent that he was coming (Plaintiff's Exhibit 110). He said he came partly on business and partly for relaxation, but would not undertake to say how much time was devoted to each. (325-327) The trial Court found that on this trip about two weeks was devoted to work in the interest of respondent (Finding 14, 1016), which would leave a month for "relaxation", taken without respondent's consent and within a few months of his arrival at his post of duty, and at a time when, due to the new system of distribution then being inaugurated, his presence in Venezuela was, if ever, important to respondent.

The evidence shows that such time on this trip as was devoted to business was spent mostly for his own personal business and that of his Venezuelan Company Ultramar. (323-333, 335-341, 381-395, 849-850)

His efforts to develop new and additional lines of business and to expand his own business activities and those of his Ultramar Company, in disregard of his duty to respondent, appear from his correspondence with his associate del Mercado during the months from April to October, 1948. To detail the pertinent portions of the correspondence would unduly extend this argument. References to it in the record and exhibits include the following: Defendant's Exhibits X, Y, Z, Z-1, Z-2, Z-4, Z-5, Z-6, Z-8, Z-10; Plaintiff's Exhibits 111 and 132. These exhibits and this testimony are sufficient to demonstrate petitioner's total disregard of his agreement to divorce himself from other activities and devote his full time to the duties of his employment by respondent.*

The Court of Appeals was right in holding on that ground that petitioner was guilty of a breach of his employment agreement.

As an additional "incident", the Court of Appeals commented upon petitioner's action regarding the patenting of a milk powder reconstituting machine, and among other things said that petitioner had taken out the patent in his own name without informing respondent. The petition says the Court overlooked Defendant's Exhibits S and L. Exhibit

*As one illustration, mention may be made of the Peruvian fish business, regarding which petitioner wrote del Mercado, "I told Marcano I wanted in". (Defendant's Exhibit X) "Today I had a very long conference with Marcano, in regard to the tuna fish canning in Peru. * * * Marcano, who made a fortune in this line, * * * is extremely interested and I am just the same." (Defendant's Exhibit Y) "If things look favorable to Marcano we will probably fly down to Lima." (Defendant's Exhibit Z-2) "I am making a trip to Lima within a few days especially for the fishing business activities. It may prove that the only business will be by Peru, Costa Rica and Mexico." (Plaintiff's Exhibit 132) Petitioner admitted that he intended to go into this fish business. (343)

S gives no intimation that petitioner proposed to take out the patent in his own name. Exhibit L was not, as the petition suggests, a letter written Hadrath and del Marcado, but was a copy, apparently mailed to Hadrath or to respondent, of a letter written by petitioner to del Mercado, although the transmission of the copy is not indicated on the letter. This exhibit was not printed and was not called to the attention of the Court of Appeals either in petitioner's brief there filed or in his petition for reargument in that Court. Its first mention by petitioner was in his present petition.

Petitioner did not inform respondent that he had filed in Venezuela a sworn application for the patent in which he represented himself to be the inventor and had invented the machine after much study. (Defendant's Exhibits O, P. and V, 232) Although in Exhibit L he spoke of taking out the patent in his own name "later to be transferred to Maple Island," he never informed respondent that he *had* taken it out in his own name (232, 242) (what was said by the Court of Appeals in that respect is literally accurate) or that having taken it out in his own name, he failed to transfer it to respondent, as in Exhibit L he said he would do. The circumstances are convincing that he never intended to. At the time of the trial it had not yet been transferred (232), and although petitioner then expressed a willingness to execute a transfer he has never done so. The Court of Appeals noticed the similarity between petitioner's conduct in this transaction and in the trade name transaction, where petitioner, after promising to transfer the registration to respondent, almost immediately participated in a transfer to his Venezuelan corporation. (Appendix 72)

On the trial petitioner admitted that Exhibit L promising to transfer the patent to respondent was written the very

day before petitioner had written respondent promising to transfer the trade name and that neither promise was ever carried out. (242)

Before taking out the patent petitioner was informed by del Mercado, who was then respondent's export manager, that the machine was covered by United States patents and that no Venezuelan patent was necessary. (Defendant's Exhibit K, dated October 21, 1947) Petitioner at first denied receipt of this letter before the patent was applied for (232-233), but the fact was established. (233, 240, 241). In fact by letter of October 25, 1947 (Defendant's Exhibit L) written before the patent was applied for, petitioner acknowledged receipt of del Mercado's letter of October 21, 1947. (Defendant's Exhibit K)

Nevertheless, petitioner went ahead, took out the patent in his own name, expecting profits "enough to frighten one", (252) and when this expectation failed of realization, he, without notice or warning to respondent, permitted the patent to be forfeited for nonpayment of the required annual fees. (664) According to the testimony of Dr. Naranjo, a Venezuela lawyer, it cannot be revived. (576) Assuming the patent to have valididity despite petitioner's false swearing as to the invention, then it was lost to respondent by petitioner's neglect or intentional forfeiture.* There was no

*At an adjourned trial session certain papers were introduced in evidence (Plaintiff's Exhibits 189 and 190) purporting to show that petitioner had on July 18, 1950, subsequent to the previous trial sessions, paid the office of the Director of Industry and Commerce of Venezuela a sum equal to the unpaid annual fees. If these receipt papers prove anything, it is merely that petitioner had induced the cashier or official in charge to take his money, but this individual does not make or amend the laws of Venezuela, and if Naranjo's testimony be true, and it is not controverted, then no act of any such person could restore life to the expired patent.

reason why the patent could not have been taken out in the name of respondent in the first instance. (576)

Petitioner's testimony regarding the whole patent matter is typical of his erratic testimony throughout the trial. Apparently for the purpose of giving the impression that his work on the patent application began before receipt of del Mercado's letters telling him it was unnecessary, he testified that an "expert engineer" engaged by him spent a "long time" making up the drawings, and finished them only "after many months or many weeks"; that his attorney who made the application started work on it "many, many months before that"; that he "worked on it for months and months and it definitely was done before Mr. del Mercado wrote, if he wrote on October 25" (the letter Exhibit K was written October 21); that the engineer and lawyer spent between them "two or three months previous to the writing of this letter" (240-242) The testimony drawn from petitioner on cross-examination made it certain that nothing was done on the drawings, and undoubtedly nothing on the application until on or after October 20, and that all of the work, if any, done by the engineer was necessarily done within four to six days, excluding a Saturday and Sunday. (248-251) "Several days apparently" petitioner finally conceded. (251) The application was filed October 27th or 28th. (240)

As far as Defendant's Exhibit L is concerned, it is too evident to admit of argument to the contrary that its contents, had it come to the attention of the Court, (assuming that in fact it did not) would not at all have affected the decision. The fact that the Court found the employment agreement terminable at will and also found grounds of justifiable discharge, independently of the patent matter, rendered inevitable a reversal as to the $49,922.34 item. Furthermore,

petitioner cannot complain of the Court's failure to take notice of an exhibit which he failed at any time to call to the Court's attention.

St. Croix Trading Company

The petition devotes approximately one-third of its length to the St. Croix Trading Company, and the fact that the affairs of this company were not discussed in the opinion of the Court of Appeals is said to be a "rather startling factor". The reason for the omission of this subject from the opinion of the Court of Appeals will be obvious to anyone who examines the record, the opinion, and findings. It was simply that the Court declined to be drawn into discussion of a matter having no bearing on any issue in the case.

Petitioner was discharged on October 30, 1948. The organization of the partnership called St. Croix Trading Company was first discussed on January 14, 1949. No evidence places its conception or inception at any earlier date. The petition's surmise that "in all likelihood" it was formed at an earlier date is without foundation in the record.*

The record, therefore, establishes no connection between the organization of St. Croix Trading Company and petitioner's discharge.

What bearing had this company or its organization upon the issues, as seen by the trial Court? To the argument of respondent that the evidence relating to this company was immaterial, the trial Court's rejoinder in its opinion was:

> "To say the least, it reveals a very cogent reason why Hadrath, and others, *may have* desired to remove the plaintiff from the sale of powdered milk in Venezuela.

*A finding places the time of organization of this company "at *some date* in the last six months of 1948 *or early in 1949*." (1019)

It reveals the mental attitude and explains the conduct of some of the parties involved in this controversy." (985)

The findings have considerable to say regarding the St. Croix Trading Company (1019-1022), but from all findings on the subject no conclusion is drawn going to the merits of the case or contributing to the decision of any issue.

As to the trial Court's suggestion that the organization of St. Croix Trading Company *may have* furnished the motive for the discharge of petitioner two and a half months earlier, it may be said first that there is a total absence of evidence of such motive and, second, that even had this Company in some way furnished the sole motive for petitioner's discharge that fact would be wholly immaterial. If the employment was terminable at will, either party had the right to terminate it at any time for good motives or bad motives. If not so terminable, but respondent had cause for termination, it had a right of termination which could not be affected by the motive which prompted the exercise of that right. Liability for breach of contract or upon quantum meruit does not rest upon mental attitudes, but upon the acts of the parties.

One of the apparent purposes of petitioner in injecting the St. Croix matter into discussion of the case is to enable petitioner to charge Hadrath with false or at least inconsistent testimony regarding it.

As to this it may be said that if there was any impeachment of Hadrath on this subject it was on a wholly immaterial matter. But aside from this a fair analysis will show that there was no impeachment. It is said in the trial Court's opinion that Hadrath testified at one time that the Company was a personal enterprise and at another that it was

a Company (Maple Island) matter. (996) This is the supposed impeachment. Hadrath testified that it was a personal enterprise and an enterprise of respondent. (S 11) It was in fact both. Respondent furnished the capital. Stoltze testified that Hadrath held respondent's interest. (813) He was a formal partner in the firm. He was allowed to receive and keep the earnings, about $13,000, evidently as additional compensation or bonus. He paid an income tax on the amount. (501, 505, 508, 513, 514, 523, 524-526, 793; Supp. Rec. 17)

There is considerable talk in the petition about alleged inconsistency in the testimony of Hadrath as to who were the partners in the St. Croix Trading Company and who received the distributable income. Some confusion arose from the fact that the formal partnership articles named one group of persons as the partners, but it appeared that certain of them held their interests for the benefit of others. In naming the parties signatory to the contract as the partners Hadrath was legally accurate. All distributions of income except one were to the named partners; the one exception was the final distribution which went by name to the persons whose interests were represented by the partners. One of these persons was Anthony B. Toro. This account was not called to the attention of Mr. Hadrath until after a pretrial deposition, at which he testified that he did not know whether Toro had received any payment from St. Croix Trading Company and that *an* accounting with St. Croix Trading Company did not show any payment to Toro. Hadrath first saw this account within two weeks before the trial. (509) It had been in the possession of his tax man (Id.) At the trial, after examination of the account, Hadrath's error in his pretrial answer was admitted. (504)

An examination of all Hadrath's testimony regarding St. Croix Trading Company will show that any suggestion of false testimony is without substance.

Petitioner's Testimony, Credibility and Weight

For the existence of the alleged Mexican agreement and on the disputed question regarding the nature of the Venezuelan agreement, petitioner's case rests solely on his own uncorroborated testimony as to oral conversations with Hadrath. This brings sharply into question the trustworthiness of petitioner as a witness, his truthfulness, consistency, candor and memory as reflected generally in his testimony. The record of his other testimony in the case shows him to be utterly unworthy of any credence. Reasonable limitations of space forbid any attempt to list all of the infirmities of petitioner's testimony exhibited by the record, but certain examples will be given, classified by categories, which have been universally recognized by judges as criteria of credibility. These examples are of petitioner's own testimony, disregarding contradictions by other witnesses.

1. Petitioner testified to events which never occurred, with circumstantial detail. That cannot be honest error and can be only fabrication thought to be helpful.
   (a) In his responses to pretrial interrogatories he swore that his stock in the Distribuidora Corporation was issued for services and for the transfer by him to the corporation of the trade name "Valle Verde." So, referring to the response, "Q. * * * You thought it was true when you wrote it, you say now it isn't. I put it to you that when you wrote it, therefore, you remembered some-

thing that didn't happen, is that right? A. Evidently Mr. Butler." (221)

(b) In response to a pretrial interrogatory he falsely swore to attending a world series baseball game in Cleveland in an attempted evasion of disclosure of the real purpose of his visit to that city on the day in question, namely solicitation of personal business in violation of his employment agreement with Maple Island (respondent). (B. 62-64) There was no such baseball game, as his counsel finally stipulated. (381-395)

(c) He swore in a response to a pretrial interrogatory to a detailed itinerary of a trip on behalf of Maple Island covering the greater part of Venezuela consuming "the better part of a month," and on cross-examination said that the response was "completely untrue." (631-632, 413, B 102)

2. *Contradictions by other statements.* He took out a patent in his own name in Venezuela on a milk-mixing machine owned and patented by the defendant in the United States. He never informed defendant that he had done so. (232, 242) In explaining his conduct about it he swore first one way and then another in various respects:

(a) He testified that the drawings for the machine had been furnished him by Maple Island. (231, 235, 236) Then, confronted with documents, he testified he had taken one of the machines to Venezuela and there had had some engineer fabricate the drawing for him. (237, 239, 240, 248)

(b) He could not recall where he got the machine from which he had the drawings made in Venezuela (248), and later said he got it from Hadrath and

attributed to him exact quotations of the conversation giving it to him. (253-254)

(c) He testified that Maple Island told him they had no drawings for the machine prior to his return to Venezuela on October 14, 1947 (253, 254, 256, 257), but testified that after these conversations and on October 17, 1947 he cabled Hadrath to furnish him the drawings (Defendant's Exhibit F, 257), thereby disclosing his five verbatim quotations of Hadrath on pages 353, 354, 355 and 356 to be fabrications.

(d) His false testimony, for a purpose, that his Venezuelan engineer worked on the drawings "for many many months" is reviewed on pages (240-242)

(e) He testified that prior to his application for the patent October 28, 1947 (Defendant's Exhibit P, 240), he "was definitely not advised that since Maple Island had taken patent steps in the United States none was necessary on their behalf in Venezuela" (232-233), although on October 25, 1947 he had written a letter to del Mercado (Defendant's Exhibit L), in response to a prior letter from del Mercado, so advising him. (Defendant's Exhibit K, 233)

(f) In his application for the patent he falsely swore to the Venezuelan Government that he had invented the machine. (Defendant's Exhibit O, 232, 237, 256)

(g) He testified to discussing a trademark matter in Monterey the year before there was any trademark matter. (185-186)

(h) To bolster his Mexican claim he testified on direct examination that he made a second trip to Mexico in mid-1947 (later changed to 1946) *relating to the Mexican business of Maple Island,* and upon Hadrath's request. (49) On cross-examination, after persistent efforts to evade, he admitted

that the purpose of the trip was purely personal and to escape from his wife. (186-190)

3. He gave *different versions* of the same important incidents, thereby impeaching each version by the other, and himself by both. For example:
   (a) His two versions of the alleged agreement with Hadrath respecting the duration of his employment. (278-284, 313-316)
   (b) His two versions of various incidents connected with and immediately following his employment. (100, 298-300, 313)
   (c) His two versions as to an alleged agreement by Hadrath that his "agreement could be considered so changed" as to provide for one cent extra per pound on a certain order from VBEC. (310-312)
   (d) In September, 1945 he told Maple Island that the trade name had been registered in Venezuela (223) and in June, 1946 he cabled his partner to register it "to protect Maple Island." (192)
   (e) He testified that he did not have the idea that a great deal of money could be made from the Milk-made Machine (230), but when applying for the patent in his own name he wrote his associate that the possibilities for them both "is enough to frighten one" and estimated a profit of $50,000 a year. (252)
   (f) He wrote his employer, Maple Island, to whom he owed the duty of faithful disclosure and service, setting forth business reasons why Distribuidora should be dissolved (Plaintiff's Exhibit 94, 304), and at the same time wrote covertly to his associate, del Mercado, that his recommendation to Hadrath to liquidate Distribuidora was to get more capital for another enterprise in which he was associated but from which he had agreed with

Maple Island to withdraw. (Plaintiff's Exhibits 111 and 94)

(g) He testified that he told del Mercado that his employment by Maple Island depended upon del Mercado's agreeing (96, 270-271, 274), and also testified that the day after his employment in April, 1948 he saw del Mercado, but did not discuss his employment with him "other than just generalities." Confronted with the improbability, he testified that he did talk then with del Mercado about the employment (293-294) and that a letter recalled the conversation to his mind (295, 296, 299-300), although the letter in question had nothing to do either with the conversation or its subject matter. (Plaintiff's Exhibit 125)

4. *Evasions.*

(a) After his discharge plaintiff wrote a letter (Defendant's Exhibit Z-9) in which he said that while such a possibility had been discussed for months and was to be expected, he did not expect it so soon. (361) When asked about his meaning he evaded responses for four pages of the printed record (362-365) and never did explain.

(b) Asked whether Hadrath said certain words attributed to him by plaintiff in a pretrial response, it took him two printed pages of the record, and repeated rereadings of the question, to say that he was not certain but was fairly certain that Hadrath "wouldn't have" used the words in question. (310-312)

(c) Asked why he had permitted years to pass without asking for or in any way referring to Mexican commissions, he consumed a page and a quarter of the record (the answer began in the ninth line from the bottom of page 146) to say that he was too busy, which he qualified by "That isn't exactly it" (148),

and went on to give other reasons on which he evaded explanation over six and a half pages of the record. (148-154)

(d) He was asked for explanation of his cablegram. (Plaintiff's Exhibit 102) For three and a half printed pages he talked without explaining (320-324), the explanation being supplied by Hadrath. (414)

5. To avoid embarrassment he so frequently claimed *defective memory* about memorable things that, if true, his memory is untrustworthy about anything, or, if untrue, he is untrustworthy about anything.

(a) In his sworn responses to apt pretrial interrogatories he omitted all reference to (a) his solicitation of the Acme Manufacturing & Tool Company account, (b) the Bauman Company account (639, 640, and the tuna fish canning business in Peru. (640-641) Although he admitted that he had intended going into the fish business (343) and the business was the subject of voluminous correspondence (for example, Plaintiff's Exhibits 126, 127, 128, 132, Defendant's Exhibits X, Y, Z, Z-2, Z-7, Z-8), he testified that in answering the interrogatory the matter had slipped his mind. (641)

(b) Despite his work on Lubertone and the feeling that it would be a success (227) and his subsequent "terrible let-down" with the product of that company (Defendant's Exhibit Z-2) and his still later conference with that company on his September-October trip to the United States (353-354), "it wasn't in my mind" when he answered the interrogatory. (339, 227)

(c) Various of his business activities, other than Maple Island's, called for by the interrogatories

and omitted from the responses, are disclosed by Defendant's Exhibits Z-2, Z-3, Z-4, Z-5, Z-6, Z-7, Z-10 and Z-26. The Court ruled that defendant might not ask the reasons for the omission of these business activities from the witness's responses to the interrogatories which called for them. (642, B 103)

(d) On May 19, 1950, he swore to a response to an interrogatory relating to his earnings during the preceding year, 1949, which followed his discharge and omitted from the response an item of earnings during that year of between fifteen and twenty thousand dollars because "at the moment I can't particularly recall the condition of my status with the Ansull Chemical Company at that time." (643-644)

(e) He couldn't recall what lawyers other than his present one he asked for legal opinion or discussed this case with. (170-171)

6. He appeared incapable of clear differentiation between truth and untruth or between recollection and imagination.

(a) Referring to one of his sworn pretrial responses, "Q. * * * Is it true? A. Possibly—I have written it here * * * well, let's say it is true." (218)

(b) In a letter to defendant, plaintiff had said, "We have completely dropped our newspaper advertising." "Q. Had you at that time completely dropped your newspaper advertising? A. That would be difficult to say." (621)

(c) In a letter to defendant (Defendant's Exhibit Z-40), written in June, 1948, he made a certain statement which was quoted, "Q. * * * Was that true? A. To a certain extent." (654)

(d) When he was asked whether at a particular time he had any conference in New York, he answered

"If I was in New York, and I believe I did make a trip at that time,—to the best of my recollection I probably made several calls. At the moment I can't remember, exactly, probably to oil companies." (78)

(e) When asked about a critical conversation with Hadrath he responded "He *might have* said something to the effect that 'Walter, this is an awful lot of money'—and I *probably* told him in substance, 'Well, Mr. Hadrath, this is an awful lot of work.'" (276-277)

7. To illustrate his spontaneous uncertainties and consequent unreliability, random pages of the printed record may be taken. For instance pages 140 and 141 contain 25 sentences. They contain 18 qualifications such as "as I remember," "I suppose," "as I recall," "I imagine," "I feel rather positive." Page 145 of the printed record contains 15 sentences and 16 qualifications such as "I am not sure," "It would have to be," "it seems to me."

Petitioner's conduct as a witness is better disclosed by the reporter's verbatim transcript than by the narrative statement, but the foregoing illustrations may be sufficient to convey some understanding of the extent of his evasions, contradictions, defective memory, fabrications and unresponsive speeches. It was apparent on the trial that no statement of plaintiff could be taken at face value and the character of his testimony, particularly as developed on cross-examination, is such that none of it, as it finally appears in the record, can be accepted at face value and on the decisive points in the case there is no corroboration.

There is some point at which credibility of testimony becomes a question of law respecting the meaning of the term

"preponderance of evidence." Plaintiff's testimony was so tainted by the recited infirmities and coupled with great self-interest, that to call it a fair preponderance of the evidence "is simply to tax judicial credulity, ignore plain reality, and override inescapable conviction." *United States v. Muschany* (8 cir.), 139 F. 2d 661, 667. Ordinarily the appraisal of credibility is the peculiar function of a trial court. But that rule is not absolute. In the appraisal he [the witness], particularly if a party, "must be bound by his own testimony and admissions against interest * * * (and) cannot in his own case be heard by a court to deny today what he solemnly swore was true yesterday * * *." *State Farm Mutual Automobile Ins. Co. v. Bonacci* (8 cir.), 111 F. 2d 412.

The rule that uncontradicted testimony should be followed does not apply when "dealing with testimony by witnesses who stand impeached, and whose testimony is contradicted by testimony of others, or by physical or other facts actually proved, or with testimony which is inherently improbable." *Grace Bros. v. Commissioner of Internal Revenue* (9 Cir.) 173 F. 2d 170, 174. And see *Grengs v. Erickson,* 225 Minn. 153, 155, 156, 29 N. W. 2d 881, 882.

Here, if ever, is a case presented in which a trial court's conclusions as to the probative value of the testimony of a witness are to be reversed,—unless a mere ritualistic recital in findings shall preclude an appellate court from examining the substance, and unless a trial court's failure and abdication of its function compels the appellate court to the same course. That has not been the rule of the Court of Appeals or of this Court.

Misconceptions and Contradictions Manifest in the Trial Court's Opinion and Findings

An examination of the Trial Court's opinion and comparison of the opinion with the findings will disclose that the Court understood neither the issues, the position of the parties, nor the admitted facts. In this is to be found the explanation of an otherwise incomprehensible decision. Also this evidence of the Trial Court's lack of comprehension of even the essential elements of the case largely if not completely destroys any presumption of validity that would otherwise attach to the Court's conclusions.

The opinion is printed in the record and included in the "appendix" accompanying the petition. It is quoted from at length in the petition (pp. 22, 22 and 37) and was largely relied upon by petitioner in the Court of Appeals and now in this Court.

The following quotations are from the opinion. The comments which follow each quotation are based upon and limited to undisputed facts except in the single instance in which the contrary is noted.

1. "This is an action to recover commissions claimed by the plaintiff on the sale of defendant's products in Mexico and Venezuela, during 1946-1950 inclusive." (979)

This shows a misconception of the case from the outset and a confusion of mind as between the alleged Mexican and alleged Venezuelan causes of action. The Venezuelan cause of action was not for recovery of commissions but for damages for breach of contract. (6-9). It had nothing to do with sales in 1946 to 1950 except those made between April and October, 1948.

2. "The complaint not only alleges a cause of action on the contracts, but also alleges facts constituting a cause of action on quantum meruit for services in both countries." (979)

The causes of action pleaded were on express contract, one for contract commissions, the other for breach of contract. There is neither in the complaint nor amended complaint any pleading of quantum meruit. (5-9) On this point, however, the petitioner has contended that the amended complaint is broad enough to include quantum meruit.

3. "There was an agreement that plaintiff would be paid a commission of two cents a pound for his services in connection with Venezuela." (982)

This was said with reference to 1945. Neither in 1945 nor at any time prior to April, 1948 was there any agreement of any kind between petitioner and respondent in connection with Venezuela. The commissions under the 1948 agreement were not two cents a pound, but were based on a sliding scale, which included two cents.

4. "Sales were made under the contract of November, 1945 until April 2, 1948, when the contract between the parties *was altered* in a conference at Stillwater." (982)

This refers to Venezuela and is another demonstration of the Court's complete misconception of the Venezuela contract, and shows that the Court was laboring under the misapprehension that there was a Venezuela contract between the parties from November, 1945 to April 2, 1948, and that what occurred in 1948 was a mere *alteration* of this contract. There was in fact no contract existing or claimed to be ex-

isting between the parties respecting Venezuela at any time prior to April, 1948, and the one then made was a completely new and independent contract and not an alteration or amendment of any previous contract.

5. "The principal *change* in the contract in the *alterations* of April 2, 1948, was the agreement of defendant to pay the plaintiff commissions on a sliding scale. * * * " (982)

Again the false notion that the 1948 agreement was merely an amendment of some previous contract running back to 1945.

6. "The plaintiff had obtained orders for large quantities of milk that was delivered in 1948 and 1949." (983)

Petitioner never, at any time, under his employment with respondent took any orders whatever for milk. It was never so claimed. By the terms of his employment he had no authority to take orders and never solicited any. A finding says "plaintiff was not engaged to take orders * * * ." (1073)

7. "The first question presented for consideration is whether there was a contractual relationship between the plaintiff and the defendant." (985)

There never was any such question in the case. Respondent in its pleadings admitted contractual relationship with petitioner between April and October, 1948. (11)

8. "The Court heard a review of the negotiations and transactions of the parties covering a period of more than four years, during which time both parties obviously thought they had a contract defining their respective rights. For several years they acted as though they had a contract." (985)

This was said in reference to Mexico and Venezuela. Neither petitioner nor respondent ever claimed there was any contract between them respecting Venezuela "for several years" or for any period of time other than seven months in 1948.

> 9. "The plaintiff was employed by the defendant as a salesman to sell its products." (895)

> 10. "Hadrath * * * had authority to employ a salesman." (985-986)

Petitioner was not employed as a salesman or to sell respondent's products, and never so contended. There was no question in the case of authority to employ salesmen.

> 11. "The agreement between the parties in many respects may have been indefinite and uncertain, but the material portions of the contract definitely were understood by the parties; that is, *the employment of the plaintiff as a salesman* and the compensation to be paid him for his services." (986)

If there was any portion of the agreement definitely understood, it was that plaintiff was *not* employed as a salesman.

> 12. "He (plaintiff) was allowed an advertising fund at one time of $25,000." (987)

Plaintiff was allowed no advertising fund at any time and never so claimed.

> 13. "His [plaintiff's] compensation was a percentage of gross profits." (987)

Plaintiff's compensation was not a percentage of gross profits, and no one ever made such a claim. The basis of petitioner's compensation was an agreed number of cents per

pound on milk sold by respondent for exportation into Venezuela. There is a finding to that effect. (1012) Profits, either gross or net, had nothng whatever to do with it.

14. " * * * he (plaintiff) had substantially nothing left for three years service after he paid it." (Referring to a payment to petitioner's associates in Distribuidora.) (989)

There was no three years of service. Petitioner's period of service was less than seven months.

15. " * * * he (plaintiff) had devoted three years of his life to the promotion of the sales of defendant's product." (991)

This is covered by the last comment above.

16. "The defendant insists that it had a right to cancel at will the *contract of 1945 as modified* April 2, 1948, for the sale of milk in Venezuela." (992)

This again is a reflection of the Court's persistent confusion regarding the origin of the 1948 contract.

17. " 'Fortunately it is unnecessary to borrow trouble by deciding this dispute.' " (992)

This was said with reference to the conflict between the testimony of petitioner and Hadrath as to whether petitioner was employed "as long as Maple Island should sell milk" in Venezuela. While the Court thus in its self-written opinion disclaimed any intention of deciding the dispute between these two witnesses, findings prepared by counsel for petitioner dated and filed the same day as the opinion did decide the dispute, or purported to do so, and decided it in favor of petitioner.

18. "If the defendant had the right to cancel the contract when it pleased, that does not mean that it could do so and at the same time cancel the right of the plaintiff to collect *on the sales already made by him.*" (992-993)

There never were any sales made or claimed to have been made by petitioner.

19. "The evidence proves that the plaintiff sold 2,566, 991 pounds of milk delivered in the year 1949, on which he has not been paid a commission." (993)

The evidence proves and petitioner admits that he never sold a pound of milk delivered in 1949 or at any other time. He was discharged on October 30, 1948.

20. "The plaintiff was entitled to the commissions on such sales in accordance with the scale fixed in the agreement of April 2, 1948." (This refers to sales made in 1949). (993)

Petitioner made no such sales.

21. "The evidence is not clear as to whether the plaintiff sold the milk delivered by the defendant in Venezuela after 1949." (993)

The evidence is indisputably clear and not disputed that petitioner did not sell such milk.

22. "There has been no justification for the denial of commissions to the plaintiff on *sales made by him* and delivered in 1949." (996)

This is another repetition showing the Court's false notion that plaintiff was employed to make and did make sales.

23. "The complaint contains allegations sufficient to state a cause of action on *quantum meruit.*" (997)

No such allegations can be found in petitioner's pleadings, although petitioner contends otherwise.

All of the foregoing affect major points in the case. On minor points the Court's memory and understanding were equally faulty. Referring to just two illustrations:

> 24. "The plaintiff answered a number of interrogatories before trial and his deposition was taken at length." (994)

Plaintiff's deposition was never taken.

> 25. "However, on October 30, 1948, Hadrath appeared at the American Club in Caracas and informed the plaintiff that * * * he was all washed up." (983)

There is no testimony by anyone that upon the occasion in question Hadrath used any such language.

To summarize, the Trial Court's concept of the Venezuelan cause of action, as shown by the foregoing excerpts from its opinion, was that petitioner had sued (1) on a contract of employment made in 1945 and amended in 1948, (2) to recover compensation measured by respondent's gross profits (3) on sales made and orders taken by petitioner (4) as an incident of which petitioner was allowed an advertising fund of $25,000.00, (5) to which employment petitioner devoted three years of service (6) regardless of the cancellation of which agreement petitioner had a right to collect "on sales already made by him," to wit: 2,566,991 lbs. of milk sold by him and delivered in 1949.

Each of these six ideas of the Court regarding the case is the reverse of the pleadings, the record, and the actual claims of petitioner. Petitioner cannot and does not dispute that the Trial Court was completely in error in each of these particulars.

That any Court so wholly lacking in comprehension of the essentials of case could reach a correct decision is highly improbable to say the least. The Court's opinion concluded: "Counsel for plaintiff may submit Findings of Fact and Conclusions of Law in accordance with this memorandum." On the same day on which the opinion was filed, and bearing the same date, there was also filed Findings of Fact and Conclusions of Law. Being filed on the same day as the opinion and being subject to the direction that they conform to the opinion, the Court naturally must have assumed that they were in accordance with the opinion. The Court assuredly would not knowingly file at the same time an opinion and findings directly in conflict with each other. Yet that is what occurred. With respect to the components (1) to (6) above enumerated, the opinion is directly contradicted by the findings, except as to (4) on which the findings are silent. The opinion and the findings could not have been written or adopted by the same person at the same time with a belief in both. The findings were evidently prepared, as was inferred by the Court of Appeals and not questioned by petitioner, by petitioner's counsel. There is a very serious question as to whether the decision is entitled to be regarded as that of the Court.

Schilling v. Schweitzer-Cummins Co. (CADC), 142 F. 2d 82, 84; *United States v. Forness* (CCA 2), 125 F. 2d 928, 942.

Respectfully submitted,

M. J. DOHERTY
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38/17

No. 306

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HAROLD B. WILLEY

IN THE

Supreme Court of the United States

October Term, 1954

WALTER BUTTERLING, *Petitioner*,

v.

MAPLE ISLAND FARM, INC., *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF PETITIONER

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IN THE

Supreme Court of the United States

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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REPLY OF PETITIONER

Respondent has filed a 54-page opposition brief, which includes a 45-page highly argumentative "Appendix." This "Appendix" is simply respondent's version of its own case based on Hadrath's testimony, which, while uncritically adopted by the court below, was neither believed nor accepted by the trial judge who had the opportunity to observe his conduct and demeanor over a period of many days. The trial court, of course, had before it other evidence on credibility than that offered by respondent, and, weighing all the evidence, found the preponderance favored petitioner. Respondent's strategy is to use its lengthy and distorted version of the facts, as set forth in

the "Appendix," to make this case appear as one involving fact detail only and thus inappropriate for this Court's review.[1]

Respondent declines to see petitioner's "Questions Presented" as meeting the standards for review simply because the various grounds urged by the petitioner for the granting of the petition were not stated in the precise text of Rule 19(b) of this Court. We have never understood that the trite repetition of the entire language of the rule relied on was either necessary or desirable.[2]

But the petition amply sets forth the several grounds which this Court advises in Rule 19(b) constitute grounds for review. The basic federal question presented, of course, is whether the court below went beyond the proper and lawful scope of appellate judicial review under Rule 52, Federal Rules of Civil Procedure, in reversing trial court findings which rested on the respective credibility of the two key witnesses, Hadrath and petitioner.[3]

The decision below, as pointed out in our petition at pages 17 *et seq.*, conflicts with decisions of the Court of Appeals for the Second Circuit in *United States* v. *Aluminum Company of America*, 148 F. 2d 416, 433, and the Court of Appeals for the Third Circuit in *Smith* v. *McLane*, 174 F. 2d 819, 821.[4] The decision below is also in conflict with the concept of the scope of appellate review stated clearly by this Court in *United States* v. *Oregon*

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[1] The manifold misstatements of respondent's "Appendix" would require an equivalent space—perhaps 50 pages—to correct. Since we do not believe even the respondent's version of the facts, distorted as it is, can affect the granting of the petition, we will not attempt here to point out the inaccuracies.

[2] Petition's Conclusion, p. 38, states the essence of Rule 19(b).

[3] We have never understood that a petition for a writ of certiorari, even under Rule 19(b), constituted a challenge to the integrity of the court below. What we urge is that the court below erred grievously.

[4] See also court of appeals' cases cited in Note 25, Petition, p. 18.

State Medical Society, 343 U.S. 326, *United States* v. *United Shoe Mach. Co.,* 247 U.S. 32, 41, and *Adamson* v. *Gilliland,* 242 U.S. 350, 353. (See Petition, pp. 19, 20.)

If the reasoning of this Court in these cases is not controlling on the scope and limits of appellate review under the Federal Rules of Civil Procedure, then this Court should review the question and authoritatively define the scope of review under Rule 52 *as applied to the credibility of witnesses. McAllister* v. *United States* (No. 23, Oct. Term, 1954, decided Nov. 8, 1954) involved the application of Rule 52 with respect to the *weight* of the evidence; no problem of *credibility* was involved, whereas here the court below has reversed findings resting on credibility without acknowledging any distinction between review of credibility findings as distinguished from those resting on the mere weight of the evidence.

Notwithstanding the trial court's clear statement that "elaborate arguments" were made on the respective credibility of Hadrath and petitioner, respondent urges now that the court did not pass on credibility as to some issues. The "Appendix" argues that the trial court, after indicating it was unnecessary to decide whether the parties made a binding agreement for so long as respondent did business in Venezuela, then proceeded to do so. Like many parts taken out of the whole, the very isolation of the trial court's statement distorts it. Respondent failed to point out that while resolving this issue with *a conclusion of law* would have been necessary to find an *express* contract, it was unnecessary *to an award on quantum meruit.* The opinion states:

> "The plaintiff is entitled to recover on the contracts alleged in his Complaint for the sale of powdered milk for the defendant in Mexico and Venezuela, or on quantum meruit for the reasonable value of his services rendered at the special instance and request of the defendant. * * * The issues may be more easily and accurately solved under quantum meruit than on

> the contract, and with more justice and equity to the parties concerned." (Pet. Appen., pp. 18, 19).

In other words, while *believing* petitioner's testimony that Hadrath had so agreed, the trial court was faced with various problems, including the difficulty of assessing future damages if its award was based on express contract. Hence the trial judge decided not to "borrow trouble," as he put it, by putting the award on the express contract. What is important is that the finding that an agreement was made showed the trial court believed and relied on petitioner's testimony on this score and disbelieved Hadrath.

That this case depended upon the credibility of two sharply conflicting witnesses has never previously been seriously challenged, although respondent apparently believes that the exigencies of the case now require it to reverse the position which it asserted so aggressively in the trial court. There respondent's case revolved entirely around an attack on petitioner's credibility; if Hadrath was telling the truth, petitioner had no case; if petitioner was telling the truth, he was entitled to recover. The exposure of the sordid part Hadrath played in what became the St. Croix Trading Company deal exploded any pretense of just cause for petitioner's discharge, for as the trial court noted, the full story of this "dummy" company and its secret partners "reveals the mental attitude and explains the conduct of some of the parties involved in this controversy."

Respondent's feeble apologies for the St. Croix Trading Company,[5] demonstrate why neither Hadrath nor any other witness tried to explain it to the trial court. But the vice is not in the *existence* of St. Croix but in what it was used for. Even now, respondent does not really try to explain that there was any legitimate purpose, for it had

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[5] Up to now respondent has always tried to ignore St. Croix Trading Company, saying only that it was "immaterial."

no purpose except as a vehicle to exploit petitioner's discharge[6] and siphon off the commissions earned by petitioner *before his discharge* on milk delivered in 1949, as the trial court found. To refer to these facts is not to argue the merits but to demonstrate the ramifications of the devious schemes of respondent and Hadrath, their standards of ethics, and the lengths to which they were willing to go to defraud and "dispose" of petitioner, all of which properly went into the trial court's total evaluation of Hadrath as a witness. As we pointed out in the petition, none of this was even touched upon by the court below. Like the case of the vital Exhibit L, the court below can only be assumed to have missed the entire significance of St. Croix and its plain impact on the reliability of the witness on whom respondent's whole case rests.[7] (See Petition, p. 24 and especially note 28)

Respondent, having failed to convince the trial judge, who saw and heard these two key witnesses testify for a total of 20 of the 27 trial days, did succeed in convincing the court below that Hadrath, branded by the trial court as having testified falsely under oath, did in fact tell the truth, although they never saw him or observed his conduct and demeanor as a witness.[8] In the present posture

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[6] The distorted effort to justify petitioner's discharge should evaporate in the light of the St. Croix scheme and the appropriation of petitioner's commissions on 1949 Venezuelan deliveries by Hadrath, Toro, and Stone, who had so much to gain by "disposing" of petitioner. They, of course, received and retained this $50,000.00 "windfall" without so much as one hour of honest effort.

[7] In this Court, of course, the fact that St. Croix was used by Hadrath as an instrument for defrauding petitioner is not of itself material. At this point, it is relevant only as it bears on credibility and the related factor of the motives for discharging petitioner and for determining whether the court below invaded trial court functions in trying to pass on the credibility of "witnesses unseen."

[8] Had the trial court resolved the issue of credibility *against* petitioner, the court of appeals would have had no proper basis for reversing on credibility, and, on affirmance, there would have been no basis for review by this Court.

of the case, respondent, with a bland inconsistency, urges that credibility never was, and is not now, the controlling and pivotal question in the case. Pursuing this "about face," respondent's opposition brief boldly asserts (at p. 7):

> "The case does not on any point rest upon the relative credibility of these two witnesses." [*i.e.*, Hadrath and petitioner.]

But, apparently forgetting this position, respondent, four pages later in the "Appendix," states:

> ". . . The [Mexico] claim is based on an alleged *oral agreement* testified to by petitioner as having been made between himself and Reuben N. Hadrath, respondent's general manager, *while on an airplane en route to Mexico City November 24, 1945.*" (Opp. Brief, p. 11.) [Italics supplied.]

Since it is admitted that Hadrath and petitioner were the only persons present at the time, plainly the existence or nonexistence of an agreement, or occurrence of conversations concerning it, *both of which Hadrath denied*, must of necessity rest on the veracity and credibility of these two witnesses.

Respondent's self-contradiction is repeated with respect to the making of the Venezuelan agreement. At pages 17, 18, respondent's opposition brief states:

> "(a) Petitioner's claim as to the duration of respondent's obligation to pay commissions *rests solely upon the oral testimony of petitioner* . . . [Italics supplied.] (p. 17).

> "(c) Plaintiff's claim as to the duration of the commission payments [for the Venezuelan agreement] was positively denied by Hadrath, *the person with whom petitioner claims the agreement was made.*" [Italics supplied.] (p. 18).

Just how respondent "squares" these mutually exclusive and conflicting positions is not explained. What is quoted

above from pages 11, 17, 18, of the opposition brief is fully in accord with the evidence and the findings, thus making the statement quoted from page 7 of the opposition brief necessarily incorrect.

If there is any doubt whether respondent has completely turned an "about face" from its hotly argued position on credibility before the trial court, that question is settled by the trial court's opinion, which states:

> "Elaborate arguments pertaining to the veracity of the plaintiff and Hadrath have been made in the briefs of counsel. Counsel for defendant say 'It (Plaintiff's testimony) is characterized throughout by untruths, contradictions, and incredibilities." (Pet. Appen., p. 17.)

The trial court flatly rejected respondent's contention as to petitioner's credibility, saying:

> "Mistakes, errors and variances as to detail may be expected in the protracted search and may be found in plaintiff's innumerable answers. For the most part they relate to unimportant and collateral matters. Whether the plaintiff attended a baseball game on a certain date, whether he came to the United States in September or in October, whether a particular conference was on Monday or Thursday of the week . . . has little probative value . . ." (Pet. Appen., p. 17.)

The experienced trial judge doubtless weighed many factors in arriving at his conclusion as to which of these two key witnesses was telling the truth on the important issues. For 20 days he had watched these two men; the crucial values in the appraisal of human testimony which are not fully preserved in a printed record were in his mind, "the furtive glance, . . . the candor or lack of it, . . . the carriage and mien. The brazen face of the liar, the glibness of the schooled witness . . . the honest face of the truthful one . . ." Here certainly is a case which fits into the classic pattern on this subject so aptly described in *Creamer* v. *Bivert,* 214 Mo. 473, 479, where the court said:

> "* * * In short, one witness may give testimony that reads in print, here, as if falling from the lips of an angel of light, and yet not a soul who heard it, *nisi*, believed a word of it; and another witness may testify so that it reads brokenly and obscurely in print, and yet there was that about the witness that carried conviction of truth to every soul who heard him testify. * * *"

After this careful analysis (discussed more fully at pages 20-33, Petition), the trial court took pains to point out factors which characterized the "business methods of Hadrath," his failure, although trained as a lawyer, to reduce agreements to writing and his conduct in setting up St. Croix Trading with Toro and Stone as secret and illegal participants, suggesting that these factors revealed something of the "mental attitude" of Hadrath and his associates. The trial court took even more pains in making explicit findings on Hadrath's unreliability, specifically that he had knowingly given false testimony.

As part of the effort to show that the credibility of Hadrath and petitioner was not controlling, respondent points out that fourteen witnesses other than the two key witnesses were heard by the Court. If this is to suggest that *the bulk* of the testimony was from these 14 witnesses, that is readily disposed of. We have pointed out that 20 of the 27 trial days were devoted to direct and cross-examination of Hadrath and petitioner. Thus the remaining 14 witnesses absorbed a total of seven days,[9] much of that through interpreters and dealing with audit reports and accounts which furnished the factual basis for assessing damages. *Not one* of these 14 witnesses was in a position or undertook to testify on what agreements were made or

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[9] For example, about three days were used in the testimony of a 29-year old ex-Federal judge of Venezuela who testified that the case was controlled by Venezuelan law—that petitioner was a "piece worker" under Venezuelan labor law, entitled only to nominal terminal leave pay but no damages.

what conversations occurred between Hadrath an and petitioner.

On the petition and the opposition brief alone, this Court would be warranted in concluding that the court below invaded the province and function of the trial court in passing on credibility and that the decision below should be reversed and remanded with directions to affirm the trial court, without further argument or proceedings in this Court.

Respectfully submitted,

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DEC 2

HAROLD B. WI

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 308

WALTER BITTERLING, *Petitioner*,

v.

MAPLE ISLAND FARM, INC., *Respondent*.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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Walter Bitterling, petitioner, prays that this Court grant a rehearing of its order of November 15, 1954, denying the petition for a writ of certiorari filed by him in this Court on August 27, 1954. Petitioner further prays that upon a rehearing and reconsideration a writ issue to review the judgment of the United States Court of Appeals for the Eighth Circuit as prayed for.

REASONS FOR GRANTNG A REHEARING AND ISSUING THE WRIT

The decisions of this Court in *United States* v. *Oregon State Medical Society,* 343 U. S. 326, *United States* v. *United Shoe Mach. Co.,* 247 U. S. 32, 41, and *Adamson* v.

Gilliland, 242 U. S. 350, 353 (Pet., pp. 19, 20), affirmed the long-standing concept that in non-jury cases trial judges are the sole judges of credibility of witnesses giving testimony in their presence. This Court has never cast any doubt on or qualified this fundamental rule. If this rule be subject to qualifications, this Court should define them for the guidance of lower Federal Courts and for counsel.

Rule 19(b) of this Court reserves to this Court the broad power of supervision with respect to departures by courts below from the ordinary course of judicial proceedings.

This case presents the collateral, but equally important, question whether the rules of this Court and its prior decisions actually control the conduct of courts below in the course of judicial proceedings or are mere general declarations of sound legal principles which lower courts may apply or ignore with impunity on the assumption that in dealing with ordinary litigation they are immune from review.

It is assumed that the conduct of courts below with respect to the proper scope of appellate review, and specifically to review of the credibility of witnesses, is not too unimportant to deserve the careful attention of this Court. Otherwise, the declared rules of judicial proceedings will, in practice, apply not to all citizens alike, but only to those having an unusual status or claims of sufficiently remarkable or unusual character as to excite the attention of this Court.

Absent review of the conduct of courts below which depart from the historic and declared course of correct judicial procedure as to credibility, the rules of this Court forbidding such departure become meaningless, and Rule 52, F.R.C.P. becomes a convenient facade behind which any court below, so disposed, may flaunt the law in a specific case, by giving lip service to the declared rule, in recitals of "clearly erroneous" and "firm conviction." If this is true, Rule 19(b) becomes an unenforceable declaration of

a sound legal principle, the importance of which is chiefly historical and academic.

An experienced trial judge over many weeks of trial found that one litigant told the truth and another testified falsely, with knowledge of that falsity. The court below, without pointing to a single specific reason or error, adopted that false witness and rejected the testimony of the witness found to be reliable. A measure of the impact of this judicial arbitrariness is found in the fact that its decision leaves petitioner without any compensation for his services and deprives him of more than $75,000.00 which he spent in its performance of his employment!

Strictly speaking, the application and enforcement of Rule 19(b) will require this Court to pass on only a narrow question:[1] Did the court below reverse the trial court on the credibility of the two key witnesses? Accordingly:

1. The review of this case will not require this Court to resolve questions of conflict of evidence or decide the *weight* of the evidence.

2. The review of this case will require this Court to determine only whether the claimed contracts rested on and were controlled by oral testimony of two opposing key witnesses.[2]

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[1] Petitioner's reservation of additional points to be urged if certiorari was granted may suggest that an extended review of evidence is involved. This, however, is not the case. The reserved questions involve primarily questions of law *and facts not in dispute*. Furthermore, should this Court so desire, it can limit its grant to only those questions whose reiew it deems appropriate.

[2] The determination of this question is rendered relatively simple by the respondent's affirmative admissions in its opposition brief (pp. 11, 17, 18) that the case rested solely on the oral testimony of Hadrath and petitioner. This leaves only the question of whether the court below had the power and right to pass on this issue.

For the reasons stated here and in the petition and reply to respondent's opposition brief, and on the admissions of respondent that all petitioner's claims rested on oral testimony, petitioner respectfully requests that this petition for rehearing and reconsideration be granted, and, upon rehearing, his petition for a writ of certiorari be reinstated and granted.

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